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No. 4414

~~1427~~
United States

Circuit Court of Appeals

For the Ninth Circuit.

FREDERICK V. LINEKER and FREDERICK V. LINEKER as
Administrator of the Estate of NORVENA LINEKER,
Deceased,

Appellant,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON
(Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as
Administratrix With the Will Annexed of the Estate of
DANIEL A. McCOLGAN, Deceased, (Substituted in Place
and Stead of said DANIEL A. McCOLGAN, Deceased),
R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK,
T. K. BEARD, GRACE A. BEARD, UNION SAVINGS
BANK OF MODESTO and STANISLAUS LAND AND
ABSTRACT COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

FILED

DEC 15 1924

R. D. MONCKTON
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

Messrs. GLENSOR, CLEWE & VAN DINE and
JOHN L. TAUGHER, Esq., Mills Bldg., San
Francisco, Calif.,

Attorneys for Appellants.

ALFRED J. HARWOOD, Esq., Kohl Bldg., San
Francisco, Calif., Attorneys for Appellees Ade-
laide McColgan, Executrix, etc., and R.
McColgan.

H. M. WRIGHT and K. C. PARTRIDGE, Esq.,
68 Post St., San Francisco, Calif.,

Attorneys for Appellees, R. S. Marshall
et al.

Messrs. CULLINAN & HICKEY, Phelan Bldg.,
San Francisco, Calif.,

Attorneys for Appellee Eustace Cullinan.

In the District Court of the United States in and for the Northern District of California, Southern Division.

No. 16,170.

FREDERICK V. LINEKER and NORVENA
LINEKER,

Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL,
MARY J. DILLON (Formerly Mary J.
Tynan), DANIEL M. McCOLGAN, R. Mc-
COLGAN, EUSTACE CULLINAN, E. C.
PECK, T. K. BEARD, GRACE A.
BEARD, UNION SAVINGS BANK OF
MODESTO, and STANISLAUS LAND
AND ABSTRACT COMPANY,

Defendants.

ANSWER TO AMENDED BILL OF COM-
PLAINT.

Now come the defendants, R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, and making answer unto the Amended Bill of Complaint in the above-entitled cause, admit, deny and allege as follows, to wit:

I.

Making answer unto the allegations contained in paragraph I of said Amended Bill of Complaint,

these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or either or any of them to make answer unto the allegations contained in said paragraph I, and basing their denial upon that ground deny that the plaintiffs, Frederick V. Lineker and Norvena Lineker, his wife, are or either of them is a citizen of the Dominion of Canada, subjects of [1*] George IV, King of England, or aliens.

II.

Admit the allegations contained in paragraph II of said Amended Bill of Complaint.

III.

Admit the allegations contained in paragraph III of said Amended Bill of Complaint.

IV.

Making answer unto the allegations contained in paragraph IV of said Amended Bill of Complaint, these defendants admit that on or about the 19th day of November, 1907, Norvena Lineker (formerly Norvena Svensen) became the owner of the real property described in said paragraph IV, but deny that on the 2d day of September, 1914, or at all or any time since said date, said real property has been of the value of Sixty Thousand Dollars (\$60,000), or any value above the sum of \$20,000, and deny said real property is now or at the time of filing of said Amended Bill of Complaint was of the value of \$75,000, or any sum in excess of the sum of \$30,000.

*Page-number appearing at foot of page of original certified Transcript of Record.

V.

Admit the allegations contained in paragraph V of said Amended Bill of Complaint.

VI.

Making answer unto the allegations contained in paragraph VI of said Amended Bill of Complaint, these defendants admit that on or about the 18th day of August, 1913, the plaintiff, Norvena Lineker made an instrument in the form of a deed of said property to her husband, Frederick V. Lineker, but allege that neither of these defendants nor either nor any of them have any information or belief sufficient to enable them or either or any of them to make answer unto the remaining allegations in paragraph VI, and basing their denial upon that ground deny that the said Norvena Lineker made said deed to Frederick V. Lineker, so that he, the said Frederick V. Lineker might be in a better [2] position to assist her in protecting her interest in said real property, and upon the same ground deny that there was no consideration given or received for the making of said instrment; and upon the same ground deny that neither of said plaintiffs have at any time made any transfer of their interest or ownership of said property, or any part thereof, except as set forth in said Amended Bill of Complaint.

VII.

Making answer unto the allegations contained in paragraph VII of said Amended Bill of Complaint, these defendants admit so much thereof as is contained in lines 9 to 26 of page 3 of said Amended

Bill of Complaint, inclusive, but as to the remaining allegations of said paragraph VII these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or either or any of them to make answer thereunto, and basing their denial upon that ground, deny the said R. McColgan did not in fact lend to said Norvena Lineker, the full sum of \$2,850.00 mentioned in the note dated June 28th, 1910, but only the sum of \$2,500.00.

VIII.

Admit the allegations contained in paragraph VIII of said Amended Bill of Complaint.

IX.

Making answer unto the allegations contained in paragraph IX of said Amended Bill of Complaint, these defendants allege that they have no information or belief sufficient to enable them or either of them to make answer thereto, and basing their denial on that ground deny generally and specifically each and all the allegations contained in the said paragraph IX.

Further making answer unto the allegations contained in said paragraph IX of said Amended Bill of Complaint, these defendants allege that if the allegations contained in said paragraph [3] IX are true, that neither these defendants nor either nor any of them ever knew or heard of said facts until long after the transactions mentioned in said Amended Bill of Complaint.

X.

Making answer unto the allegations contained in

paragraph X of said Amended Bill of Complaint, these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them, nor either nor any of them, to make answer unto the allegations contained in paragraph X of said Amended Bill of Complaint, and basing their denial upon the ground deny generally and specifically each and all the allegations of said paragraph X.

Further answering unto the allegations contained in said paragraph X of said Amended Bill of Complaint, these defendants allege that if the same are true, that these defendants had no notice or knowledge of the same until after the transactions therein mentioned.

XI.

Making answer unto the allegations contained in paragraph XI of said Amended Bill of Complaint, these defendants admit that the plaintiffs consented that the property be bought by the said R. S. Marshall, as trustee for the said plaintiff Frederick V. Lineker under an agreement hereinafter mentioned, and admit that on the 2d day of August, 1914, the said real property was sold by R. McColgan, as trustee under the deed of trust mentioned in said Amended Bill of Complaint, to the defendant, R. S. Marshall, as agent and trustee for the plaintiff Frederick V. Lineker, for the sum of \$14,000, but deny that in consenting to said sale, the said plaintiffs, or either of them relied upon the counsel of the defendants, Daniel A. McColgan and R. McColgan, or either of them, [4] but on the contrary

alleges that at the time of the said sale, said plaintiffs were represented by counsel learned in the law and of their own choosing.

XII.

These defendants admit the allegations contained in paragraph XII of the said Amended Bill of Complaint, and in that behalf allege that the said deed of trust was executed by the said defendants R. S. Marshall and his wife, Olive H. Marshall, to M. J. Connors and B. M. Lyons, Trustees for Annie Connors, and that the said defendants R. S. Marshall and his wife, Olive H. Marshall, received from said Annie Connors the sum of \$13,000, which amount was thereupon turned over to the said R. McColgan upon the explicit direction of the said plaintiffs and their said counsel learned in the law.

XIII.

Making answer unto the allegations contained in paragraph XIII of said Amended Bill of Complaint, these defendants admit that on the 3d day of September, 1914, plaintiff, Frederick V. Lineker and defendant, R. S. Marshall, entered into the agreement in writing set out in full in said paragraph XIII, and admit that on said 2d day of September, 1914, the said defendant, R. S. Marshall and his wife, the said Olive H. Marshall, made a certain deed of trust to the defendants, R. McColgan and Eustace Cullinan as trustees for the defendant, Daniel A. McColgan, for the sum of \$2,445.00, but deny that the same was without any real consideration, and deny that the same was wrongfully or unlawfully done; deny that the same

was in fraud of the plaintiffs' rights herein, but on the other hand allege in this behalf that said deed of trust was executed by the said R. S. Marshall and his wife to the said R. McColgan and Eustace Cullinan upon the explicit direction of the said plaintiffs and their said counsel learned in the law.
[5]

XIV.

Admit the allegations contained in paragraph XIV of said Amended Bill of Complaint.

XV.

Admit the allegations contained in paragraph XV of said Amended Bill of Complaint.

XVI.

Making answer unto the allegations contained in paragraph XVI of said Amended Bill of Complaint, these defendants deny the deed of trust made by defendant, R. S. Marshall and his wife, Olive H. Marshall, to R. McColgan and Eustace Cullinan as trustees for defendant, Daniel A. McColgan, was made without any consideration therefor, and deny that the same was made for the purpose of obtaining for defendants Daniel A. McColgan and R. McColgan, or either of them, an unconscionable and illegal or unconscionable or illegal advantage of plaintiffs; deny that the same was made for the purpose of wrongfully or otherwise obtaining more than was due from plaintiffs to the defendant, Daniel A. McColgan.

XVII.

Making answer unto the allegations contained in paragraph XVII of said Amended Bill of Com-

plaint, these defendants deny that each and all, or each or all, or any of the transfers or attempted transfers of said property, or all or any of the dealings therewith by any of the defendants subsequent to the said 24th day of September, 1914, were made without any consideration passing to the plaintiffs, or either of them; deny that the same were and are, or were or are, illegal.

XVIII.

Making answer unto the allegations contained in paragraph [6] XVIII of said Amended Bill of Complaint, these defendants deny that prior to the commencement of this action and on or about the 3d day of June, 1918, plaintiff, Frederick V. Lineker, revoked and rescinded, or revoked or rescinded, all or any right of the said defendant, R. S. Marshall, to act for the said Frederick V. Lineker as his agent, or otherwise, under the agreement between them dated September 2, 1914, except that on or about the 3d day of June, 1918, plaintiff, Frederick V. Lineker, was and for a long time had been in default under said agreement, and that he did serve a certain notice upon the said defendant, R. S. Marshall, as more fully hereinafter set forth.

XIX.

Making answer unto the allegations contained in paragraph XIX of said Amended Bill of Complaint, these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or either of them to make answer to the allegation that the sum of \$13,000 received by Daniel A. McColgan on the 2d

day of September, 1914, was greatly or at all in excess of all moneys due or owing to him from the plaintiffs, or either of them, and basing their denial upon that ground, deny that the said sum received by the said Daniel A. McColgan was greatly or at all in excess of the moneys due or owing to him from the plaintiffs, and upon the same ground defendants deny that the deed of trust made by defendants, R. S. Marshall and Olive H. Marshall, to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan was without consideration or void as against these plaintiffs.

XX.

Further making answer unto the remaining allegations of said paragraph XIX of said Amended Bill of Complaint, these defendants deny that all or any of the attempted conveyances [7] under said last-named deed of trust were or are void or illegal or made without any consideration moving to these plaintiffs, or either of them, and deny that any or all of the conveyances made or attempted to be made by the said R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan under said deed of trust dated September 2, 1914, are void and of no virtue as against these plaintiffs, or either of them, and deny that the conveyance set out in said Amended Bill of Complaint by R. McColgan and Eustace Cullinan to E. C. Peck is void and deny that said conveyance is of no virtue against these plaintiffs, or either of them, and deny that the conveyance of said property by said E. C. Peck to the defendant, T. K. Beard, is void and of no effect

or unlawful as against these plaintiffs, or either of them; and deny that the conveyance of said property by T. K. Beard and Grace A. Beard to R. S. Marshall is unlawful or void, or of no effect as against these plaintiffs or any of them.

XXI.

Making answer unto the allegations contained in paragraph XX of said Amended Bill of Complaint, these defendants allege that neither they nor either nor any of them have any information or belief sufficient to enable them or any of them to make answer to the allegations contained in said paragraph XX, and basing their denial upon that ground deny generally and specifically each and all the allegations of said paragraph XX contained.

SECOND.

And for a further and separate defense to said action, these defendants allege that said action is barred by the laches of said plaintiffs.

THIRD.

For a further and separate defense to said action, these defendants allege that said action is barred by the provisions [8] of subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

FOURTH.

For a further and separate defense to said action, these defendants allege that said action is barred by the provisions of Section 318 of the Code of Civil Procedure of the State of California.

FIFTH.

For a further and separate defense to said action,

these defendants allege that said action is barred by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of the State of California.

SIXTH.

For a further and separate defense to said action, these defendants allege that said action is barred by the provisions of Section 343 of the Code of Civil Procedure of the State of California.

SEVENTH.

For a further and separate defense to said action, these defendants allege:

I.

That heretofore, and on, to wit, the — day of —, said plaintiffs commenced a certain action at law in the above-entitled court against the said defendant, Mary J. Dillon, formerly Mary J. Tynan, wherein the said plaintiffs alleged that by the acts of said Mary J. Dillon that the said plaintiffs had lost the land described in the amended complaint herein and prayed for judgment against the said Mary J. Dillon for the damages suffered by them, namely, the value of the land so lost;

II.

That such proceedings were had in the matter of said [9] action at law that subsequently and on the 3d day of October, 1919, the said plaintiffs obtained a judgment against the said Mary J. Dillon for the sum of \$32,131.75, upon the allegations and theory of the said plaintiffs that the said plaintiffs had lost the land described in the amended complaint herein through the actions of the said Mary J. Dillon.

III.

That subsequently the above-entitled court made and entered its order reducing the amount of said judgment to the sum of \$28,000, and that these defendants are informed and believe that the said plaintiffs have collected said amount, or at least the major portion thereof and have, therefore, been fully paid for said land.

EIGHT.

Further making answer unto the said amended complaint, these defendants allege:

I.

That from the 19th day of November, 1907, down to the 18th day of August, 1913, one Norvena E. S. Lineker (formerly Norvena E. Svensen) was the owner of that certain real property situated in the County of Stanislaus, State of California, and more particularly described as follows, to wit:

All that certain portion of the Northwest quarter of section Six (6) in Township Four (4) South, Range Nine (9) East, Mount Diablo Base and Meridian, lying North and West of the Paradise Road.

II.

That said real property was on the 6th day of August, 1915, and had been for some time prior thereto, subject to a life interest therein, in favor of one Ole Svensen; that said Ole Svensen died on the 6th day of August, 1915;

III.

That on the 22d day of September, 1912, Norvena E. [10] Svensen and Frederick V. Lineker, plain-

tiffs herein, intermarried, and ever since the said 22d day of September, 1912, they have been and now are husband and wife.

IV.

That on the 18th day of August, 1913, said Norvena E. S. Lineker conveyed said real property by gift deed to Frederick V. Lineker, and said conveyance was recorded in the office of the County Recorder in said Stanislaus County, on July 27, 1914, in the Volume 193 of Deeds, at page 590 thereof, records of said County of Stanislaus; that on or about the 20th day of June, 1910, and while she was the owner of said real property, the said Norvena E. S. Lineker executed and delivered to defendant, Daniel A. McColgan, a deed of trust wherein and whereby the said Norvena E. S. Lineker conveyed and granted the said real property to said R. McColgan as trustee, to secure the payment by the said Norvena E. S. Lineker of a certain promissory note, executed by said Norvena E. S. Lineker to the defendant, Daniel A. McColgan, as payee thereof, for the sum of Twenty-eight Hundred Fifty Dollars (\$2850.00), and to secure the payment also of other sums that should or might be loaned by said Daniel A. McColgan to Norvena E. Lineker, and evidenced by the promissory note or notes of Norvena E. Lineker and said deed of trust was recorded in the office of the County Recorder of the County of Stanislaus, State of California, on the 22d day of April, 1911, in Volume 146 of Deeds, at page 378; and that at the time when the said Norvena E. S. Lineker conveyed the

said real property to the said plaintiff by deed of gift, as aforesaid, the said real property was subject to the said deed of trust.

V.

That on the 11th day of June, 1913, in an action then pending in the Superior Court of the State of California, in and [11] for the County of Alameda, one J. A. Williams, plaintiff therein, recovered a judgment against said Norvena E. Svensen, who afterwards became Norvena E. S. Lineker when she married Frederick V. Lineker, as aforesaid, which judgment was for the sum of \$1,285.00, together with \$15.00 costs; that in said action a writ of execution was issued to the sheriff of the County of Stanislaus on the 29th day of July, 1913, directing said sheriff of the county of Stanislaus to satisfy said judgment out of the property of said Norvena E. Svensen; that thereafter, and in pursuance of said writ of execution, A. S. Dingley, as the sheriff of said county of Stanislaus, did, on the 7th day of August, 1913, levy upon the real property, being the same property described herein, and in said deed of trust, and after giving notice as required by law, said sheriff of the county of Stanislaus sold said real property to one William C. Crittendon, who was the highest bidder thereat, for the sum of Thirteen Hundred Sixty-one and 20/100 (\$1361.20) Dollars, and said sheriff of said county of Stanislaus on said 30th day of August, 1913, issued to said William C. Crittendon his certificate of said sale, in accordance with the law, and a duplicate of said

certificate was duly filed by said sheriff of said county of Stanislaus in the office of the county recorder of the county of Stanislaus, and there recorded on the 3d day of September 1913, in Volume 3 of Certificates of Sale, at page 81 thereof; that thereafter, and on the 15th day of July, 1914, said Daniel A. McColgan purchased and acquired from said William C. Crittendon all the right, title and interest of said William C. Crittendon in and to said real property, and in and to said certificate of sale, and said William C. Crittendon on the 15th day of July, 1914, executed to said Daniel A. McColgan an instrument in writing whereby said [12] William C. Crittendon granted, sold and assigned to said Daniel A. McColgan the said certificate of sale, and all the right, title and interest of said William C. Crittendon in and to said certificate of sale, and in and to said real property therein described; that said instrument in writing so executed by William C. Crittendon, to said defendant, Daniel A. McColgan, was recorded in the office of the county recorder of said county of Stanislaus at seventeen minutes past one o'clock P. M., on the 2d day of September, 1914, in Volume 3 of Miscellaneous, at page 343 thereof; that thereafter and on said 2d day of September, 1914, the said W. S. Dingley, as sheriff of said county of Stanislaus, executed to said Daniel A. McColgan, in accordance with the law, his deed reciting the facts of the issuance of said writ of execution, the sale thereunder, the issuance of his certificate of sale to said William C. Critten-

don as aforesaid, the assignment by said William C. Crittendon to said Daniel A. McColgan, as aforesaid, and granting, in accordance with the law, and in pursuance of the statute in such cases made and provided, to said Daniel A. McColgan all the right, title and interest and claim which the said judgment debtor, Norvena E. Svensen, had, at the time of the levy of said writ of execution, as aforesaid, or on the said 2d day of September, 1914, had in or to said land; and said deed from said sheriff to said Daniel A. McColgan was recorded in the office of the county recorder of said county of Stanislaus at thirteen minutes past two o'clock P. M. on the 2d day of September, 1914, in Volume 207 of Deeds at page 143 thereof.

VI.

That on or about the 23d day of April, 1914, said R. McColgan, as the trustee named in said deed of trust, gave [13] notice, and caused notice to be given, in accordance with the terms of said deed of trust, that he would on May 25, 1914, sell at public auction, at a time and place set forth in said notice, the property described in said deed of trust, being the same property herein described, and that said sale was thereafter postponed from time to time, as provided in said deed of trust, and at the request of plaintiffs, from the 25th day of May, 1914, to the 2d day of September, 1914, and on said 2d day of September, 1914, at 3 o'clock P. M., on said day, said real property was sold by R. McColgan, as the trustee named in said deed of trust, under and in accordance with the provi-

sions of said deed of trust, and at said sale, the said real property was sold by said R. McColgan, as such trustee, to R. S. Marshall, defendant herein.

VII.

That on and prior to the 2d day of September, 1914, the said real property was subject to certain liens and encumbrances as follows, to wit:

An attachment levied May 21, 1912, in an action then pending in the Superior Court of the State of California, in and for the county of Sanislaus, entitled "Farmers and Merchants Bank, a corporation, vs. Norvena E. Svensen and Mary J. Tynan," which attachment was for \$1,047.75, with interest at the rate of eight (8%) per cent, from the 14th day of July, 1911, interest to be compounded semi-annually.

Attachment levied in an action by First National Bank of Modesto, a corporation, plaintiff, vs. Norvena E. Lineker and Fred V. Lineker, defendants, which attachment was for \$193.34.

Attachment levied November 6, 1912, in an action then [14] pending the the Superior Court of the State of California, in and for the county of Stanislaus entitled "Mary J. Tynan, Plaintiff, vs. Norvena E. Lineker (Formerly Norvena E. Svensen), Defendant," which attachment was on the 4th day of August, 1914, reduced to judgment in favor of the plaintiff for the sum of One Thousand Two Hundred and Sixty-four and 91/100 Dollars (\$1,264.91), with interest thereon at the rate of seven per cent (7%) per annum.

The claims which were secured by said attachments in favor of said First National Bank of Modesto and said Farmers and Merchants' Bank, a corporation, and by said attachment and judgment in favor of said Mary J. Tynan, respectively, have never been satisfied or discharged.

VIII.

That the said plaintiffs did not have sufficient money to enable them, or either of them, to purchase said real property at said sale so to be held under said deed of trust and that neither of said plaintiffs had any credit which would enable them, or either of them, to borrow sufficient money to purchase the said property at said sale; that in order to purchase the said property at said sale under said deed of trust, it was necessary to secure and have the sum of \$14,000.

IX.

That the said plaintiffs and their counsel solicited the defendant, R. S. Marshall, to purchase the said property at said trustee's sale, and the said R. S. Marshall then and thereupon agreed to purchase the said property and to borrow from one Annie Connors the sum of \$13,000, and the said defendant, R. S. Marshall, then and thereupon agreed to purchase the said property and to execute his promissory note, together with a deed of trust, for sufficient money to purchase the same. [15]

X.

That at the same time, the said plaintiff, Frederick V. Lineker and defendant, R. S. Marshall,

entered into a certain agreement in writing, in the words and figures following, to wit:

“THIS MEMORANDUM OF AGREEMENT, made and entered into this 2d day of September, 1914, between R. S. Marshall of the County of Stanislaus, State of California, the party of the first part, and Fred V. Lineker, of the County of Alameda, State of California, the party of the second part, WITNESSETH:

“WHEREAS, R. S. Marshall has this day purchased for said Fred. V. Lineker that portion of the northwest quarter of section six (6) township four (4) south, range nine (9) east, Mount Diablo, lying north and west of the County Road known as the Paradise Road, and being situate in the County of Stanislaus, State of California, and in accordance with his understanding and agreement has given his promissory notes secured by deeds of trust upon said premises, one for \$13,000.00 to Annie Connors, and one for \$2,455.00 to Daniel A. McColgan, and has become personally liable therefor.

“It is agreed by and between the said parties hereto that said party of the first part shall cause the said premises to be surveyed, and subdivided and sell the same, upon the terms and conditions hereinafter specified, and the proceeds thereof shall be divided as hereinafter specified, the said share going to the party of the first part being for and in consideration of the labor and service performed by him, and the responsibility assumed by him.

“It is further understood that of the \$2,455.00

loan, \$455.00 has been used to pay the first six months interest of the \$13,000.00 loan, and that possibly the said party of the second part may require, for his own use prior to the sale of any of said premises, some money from time to time, and the party of the first part agrees that in case the said party of the second part desires, he will repay to him the said sum of \$455.00, said amount, however, to be paid at the rate of not more than \$75.00 a month.

“The party of the first part, as hereinbefore specified, is immediately to cause the said premises to be surveyed and laid out, and upon the sale of said premises, or any portion thereof, the proceeds are to be applied as follows, to wit:

“Toward the payment of the principal and interest of any of the aforesaid indebtedness, and taxes and assessments imposed upon said premises and any other expenses that by subsequent agreement between the parties may be incurred, and the balance is to be divided equally between the parties hereto.

“It is understood that said land is to be sold at such prices as from time to time may be agreed upon between the parties hereto.

“This agreement is intended to extend to and bind the heirs, executors, administrators and assigns of the parties hereto.

“In case the parties are unable to agree as to the price of sale, said matter shall be submitted to arbitration. [16]

“IN WITNESS WHEREOF, the parties hereto

have hereunto subscribed their names the day and year first above written.

“R. S. MARSHALL.

“FRED V. LINEKER.”

XI.

That on the 2d day of August, 1914, the said real property was sold by R. McColgan as Trustee under the said deed of trust, to the defendant, R. S. Marshall, for the sum of \$14,000, and the said defendant, R. S. Marshall, and the defendant, Olive H. Marshall, gave their promissory note for \$13,000 to said Annie Connors and executed their deed of trust, conveying said land to M. J. Connors and B. M. Lyons, Trustees for the said Annie Connors, and the said defendants, R. S. Marshall and Olive H. Marshall gave their promissory note to Daniel A. McColgan for the sum of \$2,455.00, and made, executed and delivered to R. McColgan and Eustace Cullinan, their deed of trust to said land as security for said promissory note.

XII.

And the defendant, R. S. Marshall, paid to Daniel A. McColgan, the sum of \$14,000, the purchase price of said land and paid to Annie Connors, the sum of \$455.00, the interest in advance, and paid the remaining \$1,000 for the use and benefit of the said plaintiff, Frederick V. Lineker.

XIII.

That the said deed of trust to M. J. Connors and B. M. Lyons, as trustees for said Annie Connors, was executed on the 2d day of September, 1914,

and recorded in the office of the county recorder of the county of Stanislaus on September 3, 1914, in Volume 198 of Trust Deeds, at page 634 thereof; that said deed of trust to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan was made, executed and delivered on the 2d day of September, 1914, and recorded on the 3d day of September, 1914, in Liber 210 of Trust Deeds at page 41. [17]

XIV.

That the said R. S. Marshall, immediately after the purchase of the said property at the said trustee's sale, proceeded to, and did at his own expense, survey and subdivide the said property and do everything on his part to be done or performed under the said agreement between the said R. S. Marshall and Frederick V. Lineker and the said R. S. Marshall expended from his own sums, in improving the said property, about the sum of \$—, and that the said R. S. Marshall attempted to sell and did procure purchasers for various portions of the subdivision of said real estate, and attempted on numerous and many occasions to get the said Frederick V. Lineker to join in deeds therefor; that the said Frederick V. Lineker, at various times promised to sign said deeds and to aid in effecting a sale of said property, but never did and never would sign said deeds, and as a result thereof, said defendant, R. S. Marshall, was unable to sell any portion of said property or to pay the interest upon the promissory notes to said

Annie Connors and to said Daniel A McColgan, or any part of the principal thereof.

XV.

That as a result of the actions of the said Frederick V. Lineker, as aforesaid, the said R. McColgan and Eustace Cullinan as such trustees, proceeded to advertise the said property for sale under the terms of the said deed of trust and then and thereupon, the said plaintiff, Frederick V. Lineker, commenced an action in the Superior Court of the State of California, in and for the county of Stanislaus, No. 5344, Records of said Court, against the defendants Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, and that such proceedings were had in the matter of said last-named action that Findings of Fact and Conclusions of Law and judgment were made and entered in [18] favor of the defendants and against the plaintiff, Frederick V. Lineker, a true copy of which findings of fact and conclusions of law are hereto attached, marked Exhibit "A" and made a part hereof.

XVI.

That said last-named judgment has never been appealed from and that the time to appeal therefrom has expired and said judgment has become final.

XVII.

That subsequent to the entry of the judgment in said last-named action, the said R. McColgan and Eustace Cullinan proceeded to, and did sell the said property under the said deed of trust and that

at said sale, the said property was purchased by the defendant, E. C. Peck, and that subsequently the said E. C. Peck sold and conveyed the said property to the defendant, T. K. Beard, and that subsequently, the said T. K. Beard sold and conveyed an undivided one-half interest in and to the said real property to the defendant, R. S. Marshall; that prior to said sale to Peck, said R. S. Marshall had conveyed an undivided one-half interest in said property to said T. K. Beard.

XVIII.

That on the 9th day of February, 1916, after proceedings duly and regularly had in that certain proceeding in the county of Stanislaus, State of California, numbered 4954, upon the petition of defendant, R. S. Marshall, the life estate of the said Ole Svensen, deceased, was terminated by a decree of the Superior Court of the County of Stanislaus, a true copy of which decree terminating life estate is hereto attached, marked Exhibit "B," and hereby specifically made a part hereof.

XIX.

That on the 4th day of March, 1918, T. K. Beard and Grace A. Beard, his wife, and R. S. Marshall and Olive H. Marshall, [19] his wife, made, executed and delivered to Union Savings Bank, a corporation, their promissory note for the sum of \$15,000, and as security therefor, made, executed and delivered to the Stanislaus Land and Abstract Company, a corporation, their deed of trust for the benefit of said Union Savings Bank, upon the real property herein described, and that

the defendants, T. K. Beard and R. S. Marshall are the owners in fee simple of the said real property, subject to said deed of trust to said Stanislaus Land and Abstract Company, trustee for said Union Savings Bank, and are in possession thereof.

WHEREFORE, the defendants herein answering pray that plaintiffs take nothing by this action, but that it be adjudged and decreed that the defendants, R. S. Marshall and T. K. Beard, are the owners of the said property, subject only to the said deed of trust to Stanislaus Land and Abstract Company, trustee for Union Savings Bank.

HAWKINS & HAWKINS,

JOHN S. PARTRIDGE,

Attorneys for Above-named Defendants. [20]

United States of America,

State of California,

Northern District of California,

City and County of San Francisco,—ss.

R. S. Marshall, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters and things therein stated on information and belief and as to those matters, that he believes it to be true.

R. S. MARSHALL.

Subscribed and sworn to before me this 26th day of March, 1920.

[Seal] J. W. HAWKINS,
Notary Public in and for the County of Stanislaus,
State of California.

[Endorsed]: Filed Mar. 31, 1920. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday, the 7th day of November, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this court.

(Title of Cause.)

MINUTES OF COURT—NOVEMBER 7, 1921—
ORDER SUBSTITUTING ADELAIDE Mc-
COLGAN, ETC., IN PLACE AND STEAD
OF DANIEL A. McCOLGAN.

The death of the defendant, Daniel A. McColgan, was suggested and upon motion of A. J. Harwood Esq., it is ordered that Adelaide McColgan, as administratrix with the will annexed of the estate of Daniel A. McColgan, deceased, be and she

is hereby substituted in place and stead of said defendant, Daniel A. McColgan, deceased. [22]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court, in and for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Thursday, the 19th day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM H. HUNT, Circuit Judge.

(Title of Cause.)

MINUTES OF COURT—OCTOBER 19, 1922—
ORDER SUBSTITUTING FREDERICK V.
LINEKER, ETC., IN PLACE AND STEAD
OF NORVENA LINEKER, DECEASED.

Upon motion of Wm. F. Rose, Esq., attorney for plaintiffs and upon the suggestion of the death of Norvena Lineker one of the plaintiffs herein, it is ordered that Frederick V. Lineker, Administrator of the Estate of Norvena Lineker, Deceased, be and he is hereby substituted as plaintiff in the place and stead of said Norvena Lineker, Deceased. [23]

(Title of Court and Cause.)

No. 506—IN EQUITY.

OPINION.

JOHN L. TAUGHER, Esq., Attorney for Plaintiffs.

WM. ROSE, Esq., Attorney for Plaintiffs.

Messrs. HAWKINS & HAWKINS and Messrs. MASTICK & PARTRIDGE, Attorneys for Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard and Mary J. Dillon.

Messrs. CULLINAN & HICKEY, Attorneys for Defendants, D. A. McColgan and Eustace Cullinan.

ALFRED J. HARWOOD, Esq., Attorney for Defendant R. McColgan.

MEMORANDUM—PLEA OF RES JUDICATA SUSTAINED—BILL DISMISSED.

RUDKIN, Circuit Judge.—On account of the press of other business, I will not undertake to state in detail, the issues involved in the protracted litigation between the parties now before the court. A careful examination of the voluminous pleadings, decisions and judgments in the prior litigation, convinces me that the decree in the case of Lineker vs. McColgan, affirmed by the District Court of Appeals, settled for all time the rights of the par-

ties thereto, growing out of their dealings and transactions to the following extent, at least:

First, that under the execution sale and Sheriff's deed, McColgan required the equity of redemption in the lands in controversy, in his own right, and became entitled to receive and retain for his own use and benefit all the proceeds of sale under the trust deed, above the indebtedness secured thereby, to which the plaintiff would otherwise have been entitled.

Second, that at the date of the decree the plaintiff [24] in that action was indebted to McColgan in the sum of \$2,455 the amount of the promissory note executed by Marshall to McColgan.

Third, that the second deed of trust was founded upon an adequate consideration.

Fourth, that the defendant McColgan, was not at that time indebted or accountable to the plaintiff in any sum or sums whatsoever.

I think it plain also, that the questions thus determined were within the issues and properly before the Court. It was suggested on the argument that there has been some relaxation of the rule of *res judicata* in the more recent decisions of the Supreme Court, but so far as I am advised there has been no departure from the rule announced by Mr. Justice Field in *Cromwell vs. County of Sac*, 94 U. S. 351, 352, which may be stated as follows: Where the second action is based upon, the same claim or demand as the first, the judgment in the former action, if rendered upon the merits, constitutes *and* absolute bar to any subsequent action,

concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim of demand, but as to any other admissible matter which might have been offered for that purpose. The rule there stated has been reaffirmed as late as *Meyers vs. International Trust Co.*, decided November 12, 1923.

The object of the present suit is to relitigate the questions there determined. This in my opinion cannot be done. With the rights of the parties to the former action irrevocably established to the extent above indicated, the complaint states no independent cause of action.

The plea of *res judicata* is therefore sustained and the bill dismissed.

[Endorsed]: Filed Jany. 24, 1924. Walter B. Maling, Clerk. [25]

(Title of Court and Cause.)

No. 506—IN EQUITY.

FINAL DECREE.

This cause came on to be heard this term and was argued by counsel, John L. Taugher, Esq., and William F. Rose, Esq., appearing for plaintiffs; Alfred J. Harwood, Esq., appearing for Adelaide McColgan, as Administratrix of the Estate of Daniel A. McColgan, deceased, and for R. McColgan; Eustace Cullinan, Esq., appearing for him-

self; and K. C. Partridge, Esq., and H. M. Wright, Esq., appearing for defendants R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land & Abstract Co.; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That the judgment in that certain action in the Superior Court of the State of California, in and for the County of Stanislaus, Numbered 5344, on the records of that Court, brought by Frederick V. Lineker against Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, which judgment was made and entered on the 30th day of April, 1918, is a prior adjudication of the cause of action in this suit and is a bar to the prosecution of this suit;

2. That the bill of complaint herein lacks equity and should be and is hereby dismissed as to all the defendants herein;

3. That the defendants have their costs.

Dated, the 1st day of February, 1924.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed and entered February 1, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

(Title of Court and Cause.)

No. 506—IN EQUITY.

OPINION.

JOHN L. TAUGHER, Esq., Attorney for Plaintiffs.

H. M. WRIGHT, Esq., and K. C. PARTRIDGE, Esq., Attorneys for Defendants, R. S. Marshall, Olive H. Marshall, Mary J. Dillon (formerly Mary J. Tynan), E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Co.

A. J. HARWOOD, Esq., Attorney for Defendants, R. McColgan and Adelaide McColgan, Administratrix, etc.

CULLINAN & HICKEY, Esqrs., Attorneys for Defendant, Eustace Cullinan.

MEMORANDUM.

RUDKIN, Circuit Judge.—That complaint in this case commingles matters which have become *res adjudicata* with other matters to such an extent that the Court experienced some difficulty in determining whether the complaint stated an independent cause of action against other defendants, after eliminating all matters determined adversely to the plaintiffs by the State Court.

I still adhere to my former opinion as to the scope and effect of the decision in Lineker vs. Mc-

Colgan, and I am still of opinion that the complaint states no independent cause of action against other defendants. Indeed, the whole superstructure of the plaintiffs' case seems to be predicated upon the fraudulent contract of McColgan. The complaint, of course, is susceptible to amendment as to other defendants, but no application for leave to amend has been made and the petition for a rehearing will be denied.

It is so ordered.

[Endorsed]: Filed March 17, 1924. Walter B. Maling, Clerk. [27]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER, and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased.

Complainants,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased, (Substituted in the Place and Stead of Said DANIEL A. McCOLGAN,

Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

STATEMENT ON APPEAL.

This cause came on for trial in the above-entitled court, before the Hon. Frank H. Rudkin, on the 8th day of January, 1924, the complainants herein appearing by John L. Taugher, Esquire, their attorney, the defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, appearing by E. C. Partridge, Esquire, their attorney, defendants R. McColgan and Adelaide McColgan, as executrix with the will annexed of the Estate of Daniel A. McColgan, deceased, appearing by A. J. Harwood, Esquire, their attorney, and defendant Eustace Cullinan, appearing by Messrs. Cullinan & Hickey, his attorneys, the following proceedings were had: [28]

Defendants requested leave to file supplemental answer (Defendants' Exhibit "J") setting up that the judgment in the case of Fred V. Lineker, plaintiff, vs. Daniel A. McColgan, and R. McColgan, and Eustace Cullinan and R. S. Marshall and Olive H. Marshall, his wife, defendants, in the Superior Court of the State of California in and for the

County of Stanislaus, which action was numbered 5344 on the files of said Superior Court, and is pleaded in defendants' answer in abatement, as another action pending, had become final since the filing of defendants' respective answers herein, and said supplemental answer pleaded said judgment in said action numbered 5344 in bar and estoppel of this action as a former adjudication of all the issues presented by the amended complaint herein and in said supplemental answer defendants alleged that in said action numbered 5344 said Frederick V. Lineker appeared and acted as the successor in interest of Norvena Lineker and the identical issues of fact and law were involved and litigated and determined between Norvena Lineker and Fred V. Lineker, on the one part, and Daniel A. McColgan, R. McColgan, and Eustace Cullinan, on the other part, that are tendered and involved in this action.

It was stipulated by counsel for plaintiffs that the defendants could proceed and prove anything they could prove if the supplemental answer were filed and counsel for plaintiffs also stipulated and admitted that the judgment in said action numbered 5344 in the Superior Court of Stanislaus County has been affirmed. The Court denied defendants' motion for leave to file the supplemental answer upon the admission and stipulation of plaintiffs' counsel in open court that the same facts might be proved as if pleaded and that defendants could make all the technical proofs necessary to establish their plea of *res adjudicata* with respect

to the judgment in said action numbered 5344.
[29]

The Court thereupon proceeded to try the two pleas of *res adjudicata* made by the defendants; one based on the final judgment in said action numbered 5344 and the other based on the final judgment in the case of R. S. Marshall and Olive H. Marshall against Daniel A. McColgan and R. McColgan and Eustace Cullinan, as trustees, in the Superior Court of the State of California, in and for the County of Stanislaus, which action was numbered 5353 on the files of said Superior Court and is pleaded as a bar and estoppel in defendants' respective answers. [30]

The defendants offered in evidence a certified copy of the judgment-roll in the action of Lineker vs. McColgan, certified by the Clerk of the Superior Court, in and for the County of Stanislaus. The document was admitted and marked Exhibit "A."

The defendants thereupon offered in evidence a certified copy of *remittitur* from the District Court of Appeal of the Third Appellate District, in the case of Lineker vs. McColgan. This was received in evidence and marked Exhibit "B."

The defendants thereupon offered in evidence a certified copy of the order of the Supreme Court of the State of California, transferring the case of Lineker vs. McColgan, from the Supreme Court to the District Court of Appeal, Third Appellate District, which was received in evidence and marked Exhibit "C."

The defendants thereupon offered in evidence a certified copy of appellant's points and authorities filed in the District Court of Appeal of the State of California, Third Appellate District, in the case of Lineker vs. McColgan. This was received in evidence and marked Defendants' Exhibit "D."

The defendants thereupon offered in evidence a certified copy of bill of exceptions settled and filed in the Superior Court of the State of California, in and for the County of Stanislaus, in the case of Lineker vs. McColgan. This was received in evidence and marked Defendants' Exhibit "E."

TESTIMONY OF EUSTACE CULLINAN, FOR DEFENDANTS.

EUSTACE CULLINAN, called as a witness for the defendants, sworn and testified in substance as follows: I was one of the attorneys for the defendants in the case of Fred Lineker against Daniel A. McColgan, Eustace Cullinan and Marshall and his wife, pending in the Superior Court of Stanislaus County, and numbered 5344 in the records of that court. I took part in the trial of the case. These three documents are the briefs that were filed in that case in the trial court, before Judge Langdon. [31]

The three documents were thereupon offered and admitted in evidence and marked Defendants' Exhibits "F," "G," and "H."

"Mr. HARWOOD.—And also in connection with the other defense raised in the answer, the defendants offer in evidence a certified copy of the

judgment-roll in the case of R. S. Marshall and Olive H. Marshall, plaintiffs, vs. Daniel McColgan, R. McColgan and Eustace Cullinan, duly certified by the Clerk of the Court of Stanislaus County. This was also introduced in evidence at the last trial.

Mr. TAUGHER.—I object to that, your Honor, on this ground, that that is a part of their defense. It is pleaded as a special defense. I think if they are permitted to put in their defense before I am permitted to put in my affirmative case, a very heavy burden is imposed upon me.

Mr. HARWOOD.—That is the way a plea of *res adjudicata* is usually tried.

The COURT.—I understood the defense of *res adjudicata* was to be tried separate from the main case.

Mr. TAUGHER.—Not with my consent, your Honor. I object to it being tried at this time. They plead it as a defense. Now, certainly, your Honor cannot—

The COURT.—We have wasted half a day's time if your objection is good. I assumed you were going to try that question first.

Mr. TAUGHER.—I don't want to, your Honor. I contended yesterday I wanted to have your Honor hear the whole evidence in this case before the plea of *res adjudicata* came up. That is the very contention I made from the very start of this case. I am sorry if your Honor misapprehended my contention.

The COURT.—If that question can be determined on the record, I am going to determine it first.

Mr. TAUGHER.—It cannot be determined from the record, because Norvena Lineker was not a party to that action.

The COURT.—That is for the Court to determine.

Mr. TAUGHER.—They plead this judgment as a special defense. That is set up as a third special defense.

The COURT.—It is pleaded in bar, just the same as the judgment we were considering yesterday.

Mr. TAUGHER.—That is a matter that comes up as a defense. Lineker was not a party to that action.

The COURT.—The equity rules expressly provide that a separate defense of this kind may be tried independently of the main action. [32]

Mr. TAUGHER.—I don't question that, your Honor.

The COURT.—That was the course pursued by Judge Van Fleet, and that is the course I am going to pursue.

The COURT.—I will overrule the objection.”

To which the complainants did then and there and do now except. (Complainants' Exception No. 1.)

(Testimony of Eustace Cullinan.)

The judgment-roll in the case of Marshall vs. McColgan was thereupon admitted in evidence and marked Defendants' Exhibit "I."

Whereupon defendants rested.

TESTIMONY OF EUSTACE CULLINAN, FOR COMPLAINANTS.

EUSTACE CULLINAN, recalled as a witness on behalf of complainants, testified: "This is the brief prepared by me and filed by me in the Supreme Court."

The brief in question was thereupon offered and received in evidence and marked Complainants' Exhibit 1."

The WITNESS.—(Continuing.) "There was nothing that the court regarded as enlarging the issues in the case."

Thereupon complainants offered in evidence the oral argument of Mr. A. J. Harwood on behalf of respondents in the District Court of Appeal, in the case of Lineker vs. McColgan, which document was received in evidence and marked Complainants' Exhibit 2.

Thereupon complainants offered in evidence defendants' brief in the Superior Court of the County of Stanislaus, in the case of Lineker vs. McColgan, which document was received in evidence and marked Complainants' Exhibit 3.

Complainants rested.

Defendants thereupon offered in evidence a copy of the proposed supplemental answer of defend-

ants in this action, which document was received in evidence and marked Defendants' Exhibit "J." [33]

No other testimony was offered or received on either side.

Thereupon the case was submitted to the Court for its decision.

The foregoing statement is hereby settled and allowed as and for the appellants' statement on appeal of the evidence taken at the trial of said cause.

Dated: San Francisco, California, October 24th, 1924.

FRANK H. RUDKIN,
Judge.

O. K. as settled.

GLENSOR, CLEWE & VAN DINE,
Attorneys for Complainants.

K. C. PARTRIDGE,
Attorney for R. S. Marshall, Olive H. Marshall,
E. C. Peck, T. K. Beard, Grace A. Beard,
Union Savings Bank of Modesto and Stanislaus
Land and Abstract Company.

A. J. HARWOOD,
Attorney for R. McColgan and Adelaide McColgan,
etc.

CULLINAN & HICKEY,
Attorneys for Eustace Cullinan.

[Endorsed]: Filed Oct. 24, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.

[34]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,
Defendants.

ASSIGNMENT OF ERRORS.

Now comes the above-named plaintiffs, Frederick V. Lineker, individually, and Frederick V. Lineker, as administrator of the estate of Norvena A. Lineker, deceased, and file with their petition for an appeal from the judgment and decree made and entered in the above-entitled court and cause on the

1st day of February, 1924, sustaining the plea of *res adjudicata* and dismissing the bill of complaint herein, the following assignment of errors, and specify that said order, judgment and decree was and is erroneous in this:

I.

The Court erred in holding that the judgment in that certain action in the Superior Court of the State of California, in and for the County of Stanislaus, and therein numbered 5344 on [35] the records of said court wherein Fred V. Lineker was plaintiff and Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, were defendants, was or is a bar to the prosecution of this action.

II.

The Court erred in holding that the bill of complaint herein lacks equity.

III.

The Court erred in holding that the bill of complaint herein should be dismissed.

IV.

The Court erred in entering its judgment and decree dismissing the said bill of complaint.

WHEREFORE, the appellants pray that said decree be reversed and that said District Court for the Northern District of California, Southern Division, be ordered to enter a decree reversing the decision of the lower court in said cause.

Dated: July 22d, 1924.

JOHN L. TAUGHER,
GLENSOR, CLEWE & VAN DINE,
Solicitors for Complainants and Appellants.

[Endorsed]: Filed Jul. 23, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[36]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK
V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL,
MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,

Defendants.

PETITION FOR ORDER ALLOWING APPEAL.

The above-named plaintiffs feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 24th day of January, A. D. 1924, does hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings and document upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order [37] relating to the required security required by him be made.

Dated: July 22d, 1924.

JOHN L. TAUGHER,
GLENSOR, CLEWE & VAN DINE,
Solicitors for Said Plaintiffs.

ORDER ALLOWING APPEAL.

The foregoing petition for appeal is hereby allowed.

Dated: July 23d, 1924.

HUNT,
United States Circuit Judge.

[Endorsed]: Filed July 23, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased,
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of Daniel A. McCOLGAN, Deceased, (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO, and STANISLAUS LAND AND ABSTRACT COMPANY,
Defendants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Frederick V. Lineker and Frederick V. Lineker, as administrator of the Estate of Norvena Lineker, deceased, as principals, and United States Fidelity & Guaranty Co., a corporation, organized

and existing under and by virtue of the laws of the State of Maryland, and engaged in business in the said State of California pursuant to the laws thereof, as surety, are held and firmly bound unto the defendants above named in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, to be paid to the said defendants, their heirs, executors, successors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and [39] severally, firmly by these presents.

IN WITNESS WHEREOF, the said principals have hereunto set their hands and seals, and the said surety has caused its corporate name and seal to be hereunto affixed, this 21st day of July, 1924.

The condition of the above obligation is such that whereas on the 24th day of January, 1924, a final decree was rendered, made and entered in the above-entitled cause in the Southern Division of the United States District Court, for the Northern District of California, Second Division, sustaining the plea of *res judicata* and decreeing that the bill of complaint in the above-entitled action be dismissed, and the said plaintiffs last named having obtained an order allowing an appeal from said final decree, and a citation directed to said defendants, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in said Circuit, on the 21st day of August next.

NOW, THEREFORE, if the said plaintiffs shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

(Premium charged for this bond is \$10.00 per annum.)

FREDERICK V. LINEKER,

FREDERICK V. LINEKER,

As Administrator of the Estate of Norvena Lineker,
Deceased.

UNITED STATES FIDELITY & GUAR-
ANTY CO.

[Seal] By HENRY V. D. JOHNS,
Attorney-in-fact.

Approved July 22, 1924.

HUNT,
U. S. Circuit Judge.

[Endorsed]: Filed July 23, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[40]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK
V. LINEKER, as Administrator of the Es-
tate of NORVENA LINEKER, Deceased,
Complainants,

vs.

R. S. MARSHALL et al.,

Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL.

To the Clerk of the Above-entitled Court:

Sir: Please prepare transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit and incorporate therein the following portions of the record:

1. Order *re* printing of record and transmission of original exhibits.
2. Answer of R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company to amended bill of complaint.
3. Memorandum opinion of Rudkin, J., filed January 24th, 1924.
4. Final decree of February 1st, 1924.
5. Petition for appeal.
6. Order allowing appeal.

7. Assignment of errors.
8. Bond on appeal. [41]
9. Citation on appeal, and proof of service thereof.
10. Statement on appeal.
11. Disclaimer of Daniel A. McColgan, R. McColgan and Eustace Cullinan.
12. Disclaimer of Mary J. Dillon, formerly Mary J. Tynan, and E. C. Peck.
13. Order substituting Frederick V. Lineker as administrator, in the place and stead of Norvena Lineker.

14. This praecipe.

Dated: October 15th, 1924.

JOHN L. TAUGHER,
GLENSOR, CLEWE & VAN DINE,
Solicitors for Complainants.

Due service and receipt of a copy of the within praecipe for record on appeal is hereby admitted this 15th day of October, 1924.

Served on Alfred J. Harwood Oct. 17, 1924.

_____,
Attorney for Adelaide McColgan, etc., and R. McColgan.

H. M. WRIGHT,
K. C. PARTRIDGE,

Attorneys for R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company.

CULLINAN & HICKEY,
Attorneys for Eustace Cullinan.

Rec'd copy October 16th, 1924.

[Endorsed]: Filed Oct. 17, 1924. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.
[42]

In the Southern Division of the United States
District Court for the Northern District of
California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK
V. LINEKER, as Administrator of the
Estate of NORVENA LINEKER, Deceased,
Complainants,

vs.

R. S. MARSHALL et al.,

Defendants.

PRAECIPE FOR ADDITIONAL PORTIONS
OF RECORD WHICH APPELLEES DE-
SIRE INCORPORATED IN TRANSCRIPT
ON APPEAL.

To the Clerk of the Above-entitled Court:

Dear Sir: Please incorporate in the transcript on complainants' appeal herein the following additional portions of the record, viz.:

1. Original bill of complaint filed June 6, 1918.
2. Order dated November 7, 1921, substituting Adelaide McColgan, as administratrix in place and stead of Daniel A. McColgan, deceased.
3. Memorandum opinion of Judge Rudkin filed March 17, 1924.

Dated, October 24, 1924.

K. C. PARTRIDGE,

Attorney for Defendants R. S. Marshall, Olive H. Marshall, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, Stanislaus Land and Abstract Company.

A. J. HARWOOD,

Attorney for Defendants R. McColgan and Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased (Substituted in the Place and Stead of Said Daniel A. McColgan, Deceased).

CULLINAN & HICKEY,

Per. A. J. H.

Attorneys for Defendant Eustace Cullinan.

Service and receipt of copy of foregoing praecipe is hereby admitted this 24th day of October, 1924.

J. L. TAUGHER,

GLENSOR, CLEWE & VAN DINE,

Attorneys for Complainants.

[Endorsed]: Filed Oct. 24, 1924. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[43]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK
V. LINEKER, as Administrator of the
Estate of NORVENA LINEKER, Deceased,
Complainants,

vs.

R. S. MARSHALL et al.,

Defendants.

STIPULATION IN RE SETTLEMENT OF
PRAECIPES.

It is hereby stipulated and agreed by and between the parties hereto that the following items of appellants and appellees respective praecipes may be omitted from the certified copy of the record sent up to the Circuit Court of Appeals for the Ninth Circuit, to wit:

Item No. 11 of appellants' praecipie, being a disclaimer of Daniel A. McColgan, R. McColgan and Eustace Cullinan;

Item No. 12 of appellants' praecipie, being a disclaimer of Mary J. Dillon, formerly Mary J. Fynan, and E. C. Peck;

Item No. 1 of appellees praecipie, being the original bill of complaint filed in the above-entitled cause.

Dated: October 31, 1924.

JOHN L. TAUGHER,
GLENSOR, CLEWE & VAN DINE,
Solicitors for Appellants.

ALFRED J. HARWOOD,
Solicitors for Appellees Adelaide McColgan, Ex-
ecutrix, etc., and R McColgan.

H. M. WRIGHT,
K. C. PARTRIDGE,
Solicitors for Appellees R. S. Marshall et al.
CULLINAN & HICKEY,
Solicitors for Eustace Cullinan.

It is so ordered.

PARTRIDGE, J.

[Endorsed]: Filed Nov. 1, 1924. Walter B.
Maling, Clerk. By A. C. Aurich, Deputy Clerk.

[44]

In the Southern Division of the United States
District Court, for the Northern District of
California, Second Division.

No. 506—EQUITY.

FREDERICK V. LINEKER and FREDERICK
V. LINEKER, as Administrator of the
Estate of NORVENA LINEKER, Deceased,
Complainants,

vs.

R. S. MARSHALL, et al.,

Defendants.

ORDER RE PRINTING OF RECORD AND
TRANSMISSION OF ORIGINAL EX-
HIBITS.

Upon affidavit of H. W. Glensor, one of the attorneys for the complainants herein, and good cause appearing therefor, it is hereby ordered that the amended bill of complaint and exhibits and the answer of D. A. McColgan, R. McColgan and Eustace Cullinan, and exhibits, printed, filed and docketed in the United States Circuit Court of Appeals for the Ninth Circuit, on the former appeal in the above-entitled action, numbered 3964 in the records of said court, appearing on pages 2 to 139, inclusive, of the transcript of record on file therein, need not be certified to, printed or docketed on this appeal but may be referred to and used on this appeal with the same force and effect as if the same were printed in the transcript of record on this appeal.

Upon like affidavit and good cause appearing therefor it is hereby ordered that all of the original exhibits introduced in evidence upon the trial of the above-mentioned cause in the said Circuit Court of Appeals for the Ninth Circuit may be sent up in connection with the appeal prosecuted herein as original [45] exhibits to the Circuit Court of Appeals for the Ninth Circuit, instead of being copied into the record on appeal.

Dated: San Francisco, California, October 13, 1924.

HUNT,
Judge.

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 506—IN EQUITY.

FREDERICK V. LINEKER and FREDERICK V. LINEKER, as Administrator of the Estate of NORVENA LINEKER, Deceased.
Plaintiffs,

vs.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY J. DILLON (Formerly MARY J. TYNAN), ADELAIDE McCOLGAN, as Administratrix With the Will Annexed of the Estate of DANIEL A. McCOLGAN, Deceased (Substituted in Place and Stead of Said DANIEL A. McCOLGAN, Deceased), R. McCOLGAN, EUSTACE CULLINAN, E. C. PECK, T. K. BEARD, GRACE A. BEARD, UNION SAVINGS BANK OF MODESTO and STANISLAUS LAND AND ABSTRACT COMPANY,
Defendants.

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Frederick V. Lineker and Frederick V. Lineker, as Administrator of the Estate of Norvena Lineker, Deceased, the Plaintiffs in a Suit Pending in

the Southern Division of the United States District Court for the Northern District of California, Second Division (Numbered 506 in Equity on the Records of Said Court), and to R. S. Marshall, Olive H. Marshall, Mary J. Dillon (Formerly Mary J. Tynan), Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased (Substituted in Place and Stead of Said Daniel A. McColgan, Deceased), R. McColgan, Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto, and Stanislaus Land and Abstract Company, Defendants in [48] Said Suit, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, within thirty days from the date hereof, to wit, on the 22d day of August, 1924, pursuant to an order allowing an appeal, filed and entered in the Clerk's Office of the United States District Court for the Southern Division of the Northern District of California (Second Division), from a final decree signed, filed and entered on the 24th day of January, A. D. 1924, in that certain suit, being in Equity number 506, wherein Frederick V. Lineker, individually, and Frederick V. Lineker, as administrator of the Estate of Norvena A. Lineker, deceased, are plaintiffs, and you are defendants and appellees, to show cause, if any there be, why the decree ren-

dered against the said appellants, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. H. HUNT, United States Circuit Judge for the Ninth Circuit, this 23d day of July, 1924, and of the Independence of the United States, the 148th.

HUNT,

United States Circuit Judge. [49]

Receipt of a copy of the within citation on appeal is hereby admitted this 23d day of July, 1924.

ALFRED J. HARWOOD,

Solicitors for Appellees, Adelaide McColgan, as Admr., and R. McColgan.

H. M. WRIGHT,

K. C. PARTRIDGE,

Solicitors for Appellees R. S. Marshall, Olive H. Marshall, Mary J. Dillon, E. C. Peck, T. K. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company.

CULLINAN & HICKEY,

Solicitors for Appellee, Eustace Cullinan.

[Endorsed]: No. 506. In the Southern Division of the United States District Court for the Northern District of California, Second Division. Equity. Frederick V. Lineker et al., Plaintiffs, vs. R. S. Marshall et al., Defendants. Citation on Appeal. Filed July 28, 1924. Walter B. Maling, Clerk.

[Endorsed]: No. 4414. United States Circuit Court of Appeals for the Ninth Circuit. Frederick V. Lineker and Frederick V. Lineker as Administrator of the Estate of Norvena Lineker, Deceased, Appellant, vs. R. S. Marshall, Olive H. Marshall, Mary J. Dillon (Formerly Mary J. Tynan), Adelaide McColgan, as Administratrix With the Will Annexed of the Estate of Daniel A. McColgan, Deceased (Substituted in Place and Stead of Said Daniel A. McColgan, Deceased), R. McColgan, Eustace Cullinan, E. C. Peck, T. K. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Company, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

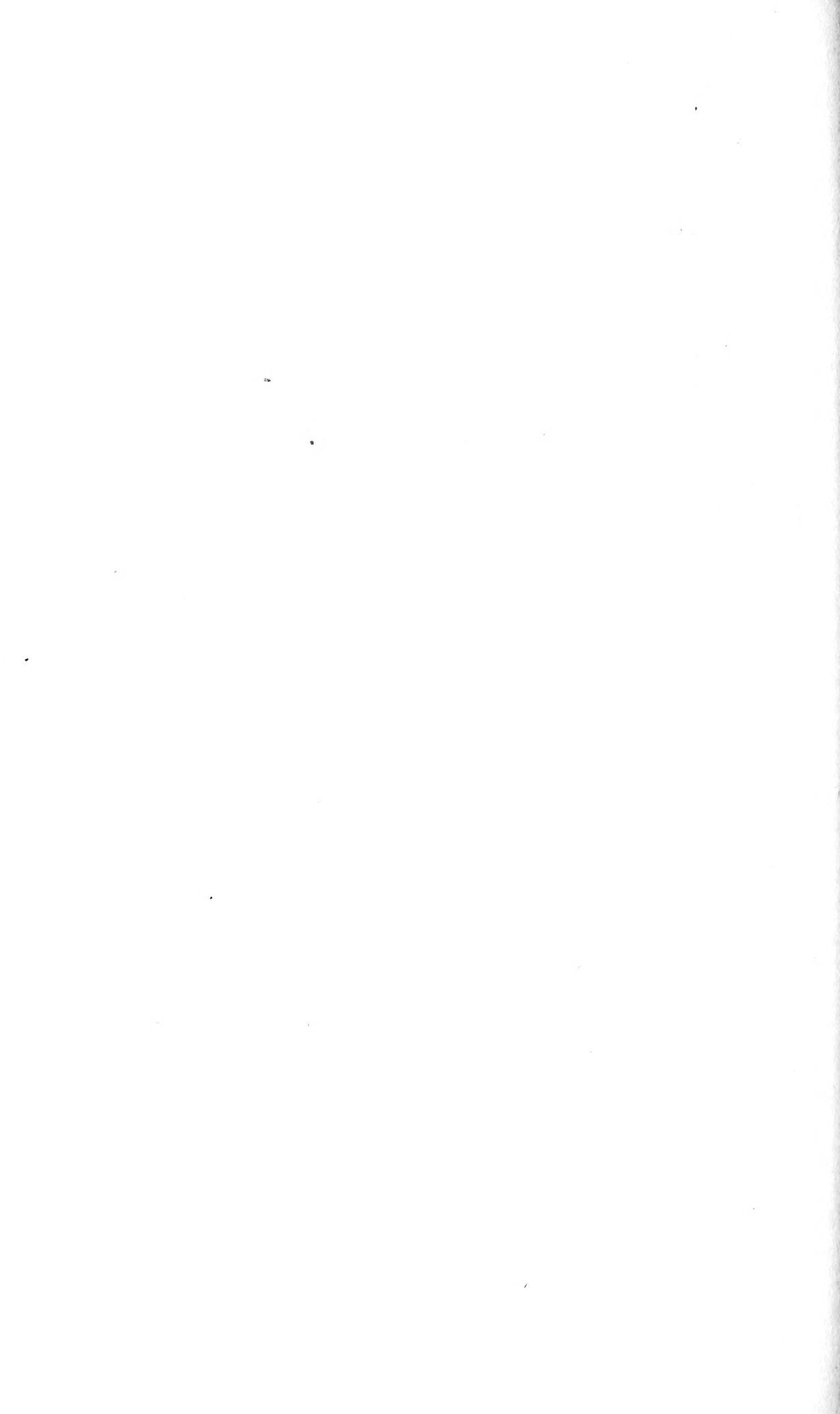
Received November 19, 1924.

F. D. MONCKTON,
Clerk.

Filed December 2, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER, et al.,	}
<i>Appellants,</i>	
vs.	
R. S. MARSHALL, et al.,	}
<i>Appellees.</i>	

BRIEF FOR APPELLANTS.

JOHN L. TAUGHER,
GLENSOR, CLEWE & VAN DINE,
Mills Building, San Francisco,
Solicitors for Appellants.

FILED
MAR 11 1925
F. D. MONDICKOW

No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER, et al.,	}
<i>Appellants,</i>	
vs.	
R. S. MARSHALL, et al.,	}
<i>Appellees.</i>	

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The appeal herein is one taken from a decree entered January 24, 1924, dismissing an amended bill of complaint on two grounds:

1. That the judgment in a certain action in the Superior Court of the State of California "is a prior adjudication of the cause of action in this suit and is a bar to the prosecution of this suit;" and

2. "That the bill of complaint herein lacks equity and should be * * * dismissed as to all the defendants herein." (Tr. p. 32.)

To the amended bill of complaint there was interposed the answer of Daniel A. McColgan (since deceased and now represented by Adelaide McColgan as administratrix with will annexed), R. McColgan

and Eustace Cullinan (Tr. 3964, p. 26),* and also the answer of the remaining appellees. (Tr. p. 2.)

The answer of Daniel A. McColgan, Reginald McColgan and Eustace Cullinan set up numerous defenses including that of "former adjudication" (Tr. 3964, p. 57), in an action numbered 5353 in the Superior Court of the State of California in and for the County of Stanislaus, and that of "another action pending" (Tr. 3964, p. 61) numbered 5433 in the same Superior Court.

The cause came on for trial January 8, 1924, at which time the last mentioned defendants sought leave to file a supplemental answer showing that the judgment in the "action pending" had been affirmed on appeal and become final. Leave was denied upon stipulation that they might nevertheless prove all facts which they could prove if the supplemental answer were actually filed. In effect, therefore, the court had before it two pleas of *res judicata* interposed on behalf of Daniel A. McColgan, R. McColgan and Eustace Cullinan.

No such pleas, however, were made on the behalf of the remaining defendants, nor were any motions to dismiss the amended bill of complaint for lack

* On October 13, 1924, this court ordered that the amended bill of complaint and exhibits thereto, and the answer of D. A. McColgan, R. Colgan and Eustace Cullinan and exhibits thereto, which were printed, filed and docketed in this court on a former appeal herein, numbered 3964, and which appear on pages 2 to 139, inclusive, of the transcript of record on file therein, might be considered, referred to and used as if it were printed in the transcript of record on this appeal. (Tr. p. 56.)

Hence reference herein made to the transcript on the former appeal are made thus: (Tr. 3964 p....); and references to the transcript actually printed and filed on this appeal are made thus (Tr. p.).

of equity interposed on behalf of any of the appellees.

The cause came on for hearing on January 8, 1924, at which time the court proceeded to try the two pleas of *res judicata* made only by the defendants D. A. McColgan, R. McColgan and Eustace Cullinan. The evidence introduced both in support of the plea and against it consisted wholly of written instruments. Thereafter the cause was ordered submitted for decision solely on the pleas in bar, with the result indicated.

The only questions arising upon this appeal are these:

1. Did the District Court err in determining that the judgment in action No. 5344 constituted a prior adjudication of the issues raised by the amended bill of complaint herein and thus that it barred the provisions of this suit

(a) against the appellees Daniel A. McColgan, Reginald McColgan, and Eustace Cullinan, who alone interposed the plea of *res judicata*, and

(b) against the remaining appellees, who did not plead it.

2. Did the District Court err in dismissing the bill for lack of equity, particularly in view of the facts, first, that no motion to dismiss on such ground or on any other ground were ever made, and second, that no hearing on the merits was ever had.

The questions raised and stated above are fully included within the specification of error which is as follows:

SPECIFICATION OF ERRORS.

I.

The court erred in holding that the judgment in that certain action in the Superior Court of the State of California, in and for the County of Stanislaus, and therein numbered 5344 on the records of said court wherein Fred V. Lineker was plaintiff and Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife, were defendants, was or is a bar to the prosecution of this action.

II.

The court erred in holding that the bill of complaint herein lacks equity.

III.

The court erred in holding that the bill of complaint herein should be dismissed.

IV.

The court erred in entering its judgment and decree dismissing the said bill of complaint. (Tr. p. 44.)

THE ARGUMENT.

A topical outline of the argument of the points of fact and law is as follows:

- I. Nature and content of amended bill of complaint.
- II. Nature of Superior Court Action No. 5353 and of judgment therein.
 - A. Action 5353 and judgment therein not a bar to this proceeding.
 - B. Effect of Action 5353 and judgment therein as a bar not involved on this appeal.
- III. Nature and effect of Superior Court Action No. 5344.
 - A. Nature and content of complaint in Action No. 5344.
 - B. Nature and content of answer in Action No. 5344.
 - C. Nature and scope of findings and judgment of Superior Court in Action No. 5344.
 - D. The points of fact and law actually in issue in Action No. 5344 in the Superior Court and in the District Court of Appeal.
- IV. The bill was improperly dismissed on the ground of lack of equity.
- V. The Law.
 - A. It was legally impossible for Daniel A. McColgan to have acquired an equity of redemption or any other estate or interest in the land by reason of his purchase of the Crittendon certificate of sale that sur-

vived the sale by the trustee under the original deed of trust.

- B. The modern doctrine of *res judicata* prevents the operation of the bar in this case.

I.

NATURE AND CONTENT OF AMENDED BILL OF COMPLAINT.

The amended bill herein alleges in addition to the jurisdictional facts concerning citizenship, legal capacity and amount involved, substantially as follows:

Norvena Lineker (now deceased) was the owner of certain real estate in Stanislaus County, California. On June 20, 1910, she conveyed this property by deed of trust to Reginald McColgan to secure payment of her note in favor of Daniel McColgan for \$2850.00 and any further sums which she might borrow from him, or which he might advance "for her use and benefit, and also any liens and encumbrances against said real property which said Daniel A. McColgan or R. McColgan, or both of them might properly pay or discharge * * *"; but the amount of the loan instead of being \$2850 was in reality only \$2500.00. (Tr. 3964, p. 5.)

On September 22, 1912, Norvena Lineker and the appellant, Frederick V. Lineker were intermarried and on August 18, 1913, Norvena

“made an instrument in the form of a deed of said property to her husband Frederick V. Lineker, so that he might be in a better position to assist her in protecting her interest in the above described property; that there was no consideration given or received for the making of said instrument; * * *”. (Tr. 3964, p. 4.)

On or about September 2, 1914, R. McColgan as trustee, sold or attempted to sell to appellee R. S. Marshall the property covered by the deed of trust. Prior to the sale, Daniel A. McColgan and R. McColgan, “unlawfully and fraudulently claimed that they were entitled under said deed of trust to a sum greatly in excess of the \$2500.00 so advanced by said McColgan” (Tr. 3964, p. 5) together with interest thereon, and all other sums which fell due under the terms of the deed of trust. They falsely and fraudulently claimed that they were entitled to \$10,000.00 and made the threat to Lineker that if he did not turn over the sum of \$10,000.00 to them before September 2, 1914, they would cause the property to be sold and thereby bring it about that both the Linekers would lose all their interest therein. In order to protect their interest, the Linekers procured one Annie Connors to advance \$13,000.00 upon the security of the property and the Linekers were prepared to purchase the property for that amount at the sale which was noticed for September 2, 1914. (Tr. 3964, p. 6.) Shortly prior to the sale the two McColgans advised Lineker that he should bid at least \$14,000.00 for the property;

“that it would make little or no real difference in the final settlement of the account between the plaintiffs and Daniel A. McColgan and R. McColgan, how much the plaintiffs bid for said property for the reason that the plaintiffs would only have to pay to the defendants Daniel A. McColgan and R. McColgan what was justly due under said deed of trust dated June 20th, 1910, and that all sums in excess of such amount for which the property might be sold would be accounted for to the said plaintiffs by the said defendants Daniel A. McColgan and R. McColgan, and turned over to the plaintiff by said defendant R. McColgan.” (Tr. 3964, p. 7.)

On the day set for the sale, an attorney representing Annie Connors suggested that the interest of all parties would be best conserved by having some third person bid in the property as trustees for the plaintiffs. The McColgans agreed to this plan and urged Lineker to permit the sale to be made to R. S. Marshall. The Linekers

“being inexperienced in business matters and particularly to matters relating to the transfer and sale or encumbering of real property and relying upon the advice and counsel of the defendants Daniel A. McColgan and R. McColgan, consented that the property be bought by said R. F. Marshall as trustee for the said plaintiff Frederick V. Lineker;”

and accordingly the property was sold by R. McColgan to Marshall as trustee and agent for Lineker for \$14,000.00. (Tr. 3964, p. 7.)

Thereupon Marshall and his wife, Olive H. Marshall, gave their promissory note to Annie Connors

for \$13,000.00, executed a deed of trust in her favor to M. J. Connors and B. M. Lyons, received the sum of \$13,000.00 and paid it over to R. McColgan as trustee. (Tr. 3964, p. 8.)

September 3, 1914, Frederick V. Lineker and R. S. Marshall entered into a certain agreement reciting Marshall's purchase of the property, his giving of the note of \$13,000.00 to Annie Connors and a note for \$2455.00 to Daniel A. McColgan. It was agreed that the property was to be surveyed, subdivided and sold by Marshall upon certain terms therein set forth, after payment of indebtedness, taxes, assessments, etc. (Tr. 3964, p. 8.)

“That on said 2nd day of September, 1914, without any real consideration whatever, passing from the said R. McColgan or Daniel A. McColgan to the plaintiff herein, or to said R. S. Marshall, the said R. S. Marshall and his wife, Olive H. Marshall, wrongfully and unlawfully and in fraud of the plaintiffs' rights herein made or attempted to make a certain deed of trust to defendants R. McColgan and Eustace Cullinan, as trustees for the defendant, Daniel A. McColgan, for the sum of \$2445.00 or thereabouts.” (Tr. 3964, p. 11.)

On January 22, 1917, R. McColgan and Eustace Cullinan sold or attempted to sell the property under the last mentioned deed of trust to E. C. Peck, who afterwards conveyed to T. K. Beard, who, together with his wife, thereafter conveyed a one-half interest to Marshall. (Tr. 3964, p. 11.)

Beard and wife and Marshall and his wife, on March 4, 1918, gave their note for \$15,000.00 to Union Savings Bank of Modesto and secured it by a deed of trust to the Stanislaus Land & Abstract Company, as trustees, and "the defendants T. K. Beard and R. S. Marshall now claim to be the owners in fee simple absolute of said real property" subject only to the deed of trust to the Stanislaus Land & Abstract Company. (Tr. 3964, p. 11.)

"The plaintiffs allege that said pretended deed of trust made by the defendants, R. S. Marshall and his wife Olive H. Marshall to R. McColgan and Eustace Cullinan as trustees for the defendant Daniel A. McColgan, was made without any consideration therefor, and for the purpose of obtaining for the defendants, Daniel A. McColgan and R. McColgan, an unconscionable and illegal advantage of plaintiffs and of wrongfully obtaining more than was due from the plaintiffs to the defendant, Daniel A. McColgan." (Tr. 3496, p. 12.)

"That each and all other transfers and attempted transfers of said property and all dealings therewith by any of the defendants, subsequent to the said 2nd day of September, 1914, were made without the plaintiffs' consent and were made without any consideration passing to the plaintiffs or either of them and are void and illegal." (Tr. 3496, p. 12.)

The sum of \$13,000.00 received from Annie Connors and paid over to the McColgans "was greatly in excess of all moneys due or owing to them from the plaintiffs or either of them". (Tr. 3496, p. 13.)

The second deed of trust securing the note for \$2455.00 made by Marshall and his wife to R. McColgan and Cullinan, as trustees for Daniel A. McColgan

“was without any consideration and void as against these plaintiffs and that all attempted conveyances and all charges against said land under said deed of trust are void, illegal and made without any consideration moving to these plaintiffs or either of them, and that any and all conveyances attempted to be made by said R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan under said alleged deed of trust dated September 2nd, 1914 (to secure note for \$2455.00), are void and of no virtue as against these plaintiffs or either of them and that the attempted conveyance hereinbefore mentioned and described”

by McColgan and Cullinan to Peck, from Peck to Beard and from Beard and wife to R. S. Marshall,

“are and each of them is unlawful and void of any effect as against these plaintiffs or either of them.” (Tr. 3964, p. 13.)

Neither of the McColgans have ever paid to the plaintiffs any part of the sum of \$13,000.00, nor have they accounted to the plaintiff for any part thereof. (Tr. 3964, p. 14.)

The relief prayed for was that the second deed of trust, securing the note for \$2455.00 be declared null and void, and all subsequent transfers of the property be declared null and void; that the plaintiffs be declared and adjudged the lawful owners of the property,

“that account be taken of the loan made by Daniel A. McColgan to the plaintiff Norvena Lineker on or about the 20th day of June, 1910, and all moneys paid thereunder, and account of all sums of money that have been received by the defendants, Daniel A. McColgan and R. McColgan for the account thereof, and from any and all sales of said real property be taken, and that the amount justly owing to the plaintiff thereunder be ascertained and declared.”

That an account be taken of all moneys received by R. S. Marshall as trustee for Lineker and any balance found due on such accounting be ordered paid to plaintiff, and that the defendants be compelled to reconvey the property to the plaintiff. (Tr. 3964, p. 14.)

II.

NATURE OF SUPERIOR COURT ACTION NO. 5353 AND OF THE JUDGMENT THEREIN.

To this amended bill of complaint, the defendants, Daniel A. McColgan, R. McColgan and Eustace Cullinan, pleaded a former adjudication in an action in the Superior Court of Stanislaus County, No. 5353 in the files thereof. It appears from the answer that this action was instituted by R. S. Marshall and Olive H. Marshall, and that Marshall, in the language of the answer of the defendants in that action, the McColgans and Cullinan, was “the agent, trustee, representative and privy of said Frederick V. Lineker and Norvena E.

Lineker.” The defendants in this action were Daniel A. McColgan, R. McColgan and Eustace Cullinan. The action was commenced December 3, 1916, and was tried December 8, 1916, findings of fact were waived, and a judgment was entered therein to the effect that the Marshalls owed Daniel A. McColgan on account of the above mentioned promissory note for \$2455.00, the sum of \$4110.01, together with interest on \$3949.51 of such sum at the rate of 1% per month from December 6, 1916. It was further adjudged that this amount was secured by the deed of trust and it was ordered that if the amount be not paid a sale of the premises might be had.

A. Action No. 5353 and Judgment Therein Not a Bar to This Proceeding.

It is alleged in the answer herein that the action prosecuted by the Marshalls, was prosecuted by them

“as trustees and agents of and for the benefit of said Frederick V. Lineker and Norvena E. Lineker, and said Frederick V. Lineker and said Norvena V. Lineker were privies to said action and judgment and are and each of them is barred and estopped by said judgment so given, made and entered in said action, and numbered 5353, from maintaining this action against any of the defendants herein and especially against the defendants, Daniel A. McColgan and R. McColgan, and Eustace Cullinan, and in particular are barred and estopped by said judgment from maintaining or asserting in this suit or elsewhere that the sum specified

in said judgment was not so due, owing and unpaid to Daniel A. McColgan at the time of the rendition of said judgment and on the 22nd day of January, 1917, at the time of said sale.” (Tr. 3964, p. 60.)

Exhibit I, consisting of the judgment roll in this action reveals, however, that neither of these plaintiffs were parties to that action, and it also utterly fails to show that the Linekers had notice thereof, so that they could in any sense of the word be bound by the judgment. The above quoted portion of the answer to the effect that the Linekers “were privies to said action and judgment” is of course a mere conclusion of the pleaders.

It further appears that this action was commenced long after action No. 5344, in which, as will hereafter appear, Lineker was endeavoring to prevent the very sale which in action No. 5353 the court ordered might be had.

As already noted, the action was commenced by the alleged agent and trustee of F. V. Lineker and Norvena Lineker on December 3rd, tried on December 8th, and had for its object the defeating of the very purpose of the institution by Lineker himself of action No. 5433. It certainly requires no argument to show that an action thus begun by an alleged trustee for Lineker, which was disposed of in five days, and during the pendency of an action by Lineker himself, to secure relief diametrically opposed to that granted in No. 5353, was not an

action to which Lineker was privy and was not an action brought by his alleged trustee for his benefit and was not one in which a judgment could be rendered which would be conclusive upon either of the Linekers. Neither do we hesitate to say that these facts are amply sufficient to brand that action as having been fraudulent and collusive to a degree.

B. Effect of Action No. 5353 and of Judgment Therein Are Not Involved on This Appeal.

It appears from the record that Judge Rudkin in deciding the plea of *res judicata*, did not take cognizance of action No. 5353, but rested his decision solely and exclusively upon the conclusion that the judgment in action No. 5433 constituted a bar. (Tr. pp. 29, 33.) No doubt, he fully appreciated the effect of the facts above stated rendering the judgment in action No. 5353 inapplicable, and of no effect so far as the plea of *res judicata* is concerned. Hence we need give no further attention to this branch of the case.

III.

**NATURE AND EFFECT OF SUPERIOR COURT
ACTION NO. 5344.**

A. Nature and Content of Complaint in Action No. 5344.

The real and vital question presented by this appeal arises in connection with the determination of the District Court that the judgment of the

Superior Court of Stanislaus County in the action numbered 5344 constitutes a prior adjudication of the cause of action in this suit and a bar to the prosecution thereof. It is necessary, therefore, to examine the judgment roll and the evidence in action No. 5344 with care and particularity.

To the amended bill of complaint herein, the defendants, Daniel A. McColgan, R. McColgan, and Eustace Cullinan pleaded as fourth special defense, the pendency of this action, No. 5344. As above stated, when this cause here under review came on for hearing before the United States District Court, the judgment in action No. 5344, which had been appealed from had become final through a judgment of affirmance rendered by the District Court of Appeal of the State of California for the Third Appellate District. To support their answer in this behalf, the last named defendants introduced in evidence the judgment roll (Exh. A), the remittitur from the District Court of Appeal (Exh. B), the order of the State Supreme Court transferring the cause to the District Court of Appeal for decision (Exh. C), copy of appellants' points and authorities filed in the District Court of Appeal (Exh. D), a copy of the bill of exceptions (Exh. E), a copy of the brief filed in the Superior Court on submission of the cause (Exhs. F, G, and H), and a copy of their proposed supplemental answer (Exh. J).

It will at once be observed that the only parties to that action were Frederick V. Lineker as plain-

tiff, and Daniel A. McColgan, and R. McColgan and Eustace Cullinan (as trustees), as defendants. R. S. Marshall and Olive H. Marshall, his wife (appellees here) were named as defendants but the action was by consent of the plaintiff, dismissed as to them before trial. Neither Norvena Lineker (now deceased, and whose personal representative is one of the appellants here), nor the appellees E. C. Peck, T. R. Beard, Grace A. Beard, Union Savings Bank of Modesto and Stanislaus Land and Abstract Co. were parties.

The complaint (contained in Exh. A) states substantially the following facts:

The ownership by Norvena Lineker of the property in question; her marriage to Fred V. Lineker on September 22, 1912; and her conveyance of that property to her husband on August 18, 1923. No mention is made of the existence or absence of any consideration for this conveyance. That at the time the plaintiff acquired the property it was subject to the deed of trust of June 20, 1910, already referred to. (Exh. A, p. 3.)

That notice of the sale of said property under the deed of trust was given and after various continuances or postponements of the date of sale, it was on September 2, 1914, sold by R. McColgan to R. S. Marshall. (Exh. A, p. 3.)

That after notice of sale had been given, and prior to the actual sale, it was agreed between Daniel A. McColgan and the plaintiff that the latter

should purchase the property at the sale for a sum of money sufficient to cover all sums then due Daniel A. McColgan under the deed of trust. That the plaintiff at that time demanded a statement of the amount so due which was refused him by Daniel A. McColgan, who nevertheless informed the plaintiff that \$10,000.00 would be a sufficient amount to cover all his demands, together with certain other alleged liens subsisting against the said property but not secured by the deed of trust. That it was then agreed that plaintiff would bid \$10,000.00 and that the difference between this sum and the amount of all legitimate claims of Daniel A. McColgan would be held by McColgan for the purpose of paying off any other liens which might be judicially determined to be valid and subsisting liens upon the property, and *upon the further understanding that Daniel A. McColgan would account to the plaintiff for all moneys thus coming into his hands.* (Exh. A, p. 4.)

That at the time of the agreement last mentioned, McColgan knew that Lineker did not have \$10,000.00 but that Annie Connors had agreed to lend him \$13,000.00 to be secured by promissory note and deed of trust. (Exh. A, p. 5.)

That on June 11, 1913, one J. A. Williams recovered a judgment against Norvena Lineker for \$1300.00; that he caused a levy of a writ of execution to be made upon the real property in question, that a sale was thereafter held and that one Crit-

tendon purchased and was given a certificate of sale by the sheriff; *that thereafter Daniel A. McColgan agreed with the plaintiff that he would purchase such certificate from Crittendon, for the use and benefit of and as trustee and agent for F. V. Lineker, and would repay himself for any expenditure thus made from the difference between the sum which should be paid for the property on the sale under the deed of trust and the amount actually due McColgan under that instrument.* (Exh. A, p. 7.)

That on July 15, 1914, Daniel A. McColgan, *in accordance with this agreement and understanding,* purchased the certificate from Crittendon, and on September 2, 1914, received a deed from the sheriff in the usual manner. (Exh. A, p. 9.)

That after the agreement above mentioned made with McColgan and prior to the sale, R. S. Marshall entered into an agreement to attend at the sale and bid \$15,455.00 for the property, and thereafter on behalf of the plaintiff, to execute a promissory note to Annie Connors, secured by a first deed of trust on the premises, and a promissory note to D. A. McColgan, for \$2455.00 secured by a second deed of trust. (Exh. A, p. 10.)

It is alleged that this promissory note for \$2455.00 was made and executed and delivered to Daniel A. McColgan for the purpose of protecting him in any payment which he might make to discharge liens and encumbrances upon the property other than

those, payment of which was secured by the original deed of trust given June 20, 1910. (Exh. A, p. 6.)

That Marshall bid \$14,000.00 for the property, paid that sum to R. McColgan as trustee and received a conveyance. Immediately thereafter Marshall and his wife executed their note for \$13,000.00 to Annie Connors, secured it by a deed of trust as agreed, and also delivered their promissory note for \$2455.00 secured by a second deed of trust to Daniel A. McColgan. (Exh. A, pp. 11-14.)

All negotiations and dealing had with Annie Connors with respect to her loan of \$13,000.00 and with McColgan with respect to the promissory note of \$2455.00, were had by the plaintiff and were not participated in in any manner by Marshall or his wife. (Exh. A, p. 14.)

It is alleged that all the various agreements, negotiations and understanding had between the plaintiff and Marshall were fully known to the McColgans, that they knew that they had been had and taken for the benefit and use of the plaintiff. (Exh. A, p. 15.)

It is then alleged that Daniel A. McColgan had requested Reginald McColgan and Eustace Cullinan, as trustees, to sell the property under the deed of trust for \$2455.00, and that they threatened so to do. That an accounting had been demanded of McColgan, which he refused to make, and that out of the sum of \$14,000.00 received by Daniel A. McColgan from the trustees, which \$14,000.00 was the

sum bid by Marshall and paid to Reginald McColgan as trustee, had not all been expended by Daniel A. McColgan in paying the amount due himself or any other lien or liens against the property, but that on the contrary there was then remaining in his hands in excess of \$2455.00 or more than sufficient to satisfy the promissory note secured by the second deed of trust. (Exh. A, p. 15.)

The prayer of the complaint was for an order and decree enjoining R. McColgan and Eustace Cullinan as trustees, from causing a sale to be made under the deed of trust, and further, that Daniel A. McColgan be required to give an accounting of all moneys which had come into his hands from or on behalf of the plaintiff. (Exh. A, p. 18.)

B. Nature and Content of Answer in Action No. 5344.

The answer of the defendants in that case, so far as material here, was a specific denial of all the material allegations of the complaint. (Exh. A, pp. 20-43.)

C. Nature and Scope of Finding and Judgment in Action 5344.

The cause was tried before the Superior Court, and judgment entered on behalf of the defendants. From that judgment an appeal was taken to the Supreme Court of the State of California, which transferred the cause to the District Court of Appeal, Third Appellate District, for decision, and the last mentioned court affirmed the judgment of the lower court.

The findings of fact in this action No. 5344 were very broad and were evidently drawn on behalf of the defendants in a very clearly apparent effort to protect them from every conceivable kind of future attack in connection with their dealings with the property. The facts were found in accordance with the allegations of the complaint relating to Norvena Lineker's ownership of the property, her marriage, her conveyance thereof to Frederick V. Lineker by deed of gift, subject to the deed of trust to R. McColgan of June 20, 1910, the obtaining of the judgment by Williams, the levy of the writ of execution thereunder, the sale to Crittendon, the issuance of the certificate of sale to him, his transfer thereof to Daniel A. McColgan and the issuance of the sheriff's deed to the latter on September 2, 1914. (Exh. A, pp. 50-55.)

In paragraph VI (Tr. 3964, p. 122) of the findings, it is elaborately found that Daniel A. McColgan, contrary to the allegations of the complaint, purchased the certificate of sale to Crittendon from the latter for McColgan's own use and benefit and that he later received the sheriff's deed for his own use and benefit. That he had never entered into any agreement with the plaintiff to purchase for the benefit of the plaintiff or for any one other than McColgan himself. (Exh. A, pp. 55-57; pp. 58, 59.)

It is found in paragraph VII that the sale under the deed of trust of June 20, 1910, took place on September 2, 1914, but

“that said sale was not made pursuant to any agreement between said plaintiff and said defendant Daniel A. McColgan whether set forth in complaint of plaintiff herein or otherwise.” (Exh. A, p. 57.)

In paragraph IX appears a lengthy finding to the general effect that the note for \$2455.00 was executed by the Marshalls in consideration of a loan of \$2455.00 to Lineker, evidently in an attempt to foreclose this appellant from ever claiming in the future, as he claims in this action, that this last mentioned note was given without any valid consideration therefor whatsoever. This finding as we shall show was wholly without the issues, unnecessary to the decision and hence not *res judicata*. (Exh. A, p. 60.)

It is further found in paragraph X that execution of this note for \$2455.00

“was intended by said Fred V. Lineker and by said Daniel A. McColgan to be and was in fact, an account stated between said Fred V. Lineker and Daniel A. McColgan, and was intended to be and was in fact, a final accounting between said Fred V. Lineker and said Daniel A. McColgan of all debts and financial transactions between them up to the time of the execution of said promissory note * * *.” (Exh. A, p. 60.)

It was further found that the facts alleged in the complaint with respect to the arrangements made between the plaintiff and Daniel A. McColgan for

the payment of any alleged liens subsisting against the real property were untrue.

As conclusions of law from these facts, it was determined:

(1) That Daniel A. McColgan was the owner of the real property at the time of the sale on September 2, 1914.

(2) That by virtue of his purchase of the Crittendon certificate and the issuance of the sheriff's deed to him pursuant thereto. That Daniel A. McColgan was entitled to any and all proceeds of the sale held on September 2, 1914, and that said Fred V. Lineker had no interest therein.

(3) That there was an account stated in accordance with the findings and that the plaintiff was not entitled to any judgment "against any of said defendants herein for an accounting of the proceeds of said sale of said real property * * *." (Exh. A, p. 62.)

D. The Points of Fact and Law Actually in Issue in Action 5344 and in the District Court of Appeals.

In what has been above said, we have endeavored to give as concise a statement and resumé of the *pleadings* in this action No. 5344 as is consistent with the necessity that in a case such as this that a full and fair statement is required, in order to enable the court to arrive at a correct conclusion.

We admit at once that a consideration of these pleadings as above outlined would tend to indicate

that a number of the material matters set forth in the amended bill of complaint herein were litigated and passed upon by the Superior Court in action No. 5344, and we as readily concede that the opinion of the District Court of Appeal in affirming the judgment of the Superior Court tends to support such a conclusion. That opinion sustains the lower court in its findings that *there was no oral agreement* between Daniel A. McColgan and the plaintiff to the effect that he would purchase the Crittendon certificate for the benefit of the plaintiff; it purports to sustain the lower court in its findings that there was an account stated and it also holds that there was no fiduciary relationship existing between Daniel A. McColgan and the plaintiff which would prevent him from purchasing the Crittendon certificate and taking the sheriff's deed in hostility to the plaintiff by reason of any confidential relationship existing between them; and lastly, that Daniel A. McColgan, by "acquiring plaintiff's equity of redemption by Sheriff's deed" became entitled to "receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled."

The appellants here contend that an examination of all the evidence submitted in support of the plea of *res judicata* shows that the lower court, in making its findings went far afield beyond the

issues raised by the pleadings and beyond the issues on which evidence was presented at the trial.

They also contend that such an examination reveals that the opinion of the District Court fell into the same error of passing upon questions not in issue. (Exh. B.)

It is the appellant's contention that *the only issue actually tried and litigated* in the Superior Court in action No. 5433 was whether Daniel A. McColgan had entered into an oral agreement with the plaintiff to purchase the Crittendon certificate of sale for the benefit of Lineker himself and that none of the rights of Norvena Lineker were involved in that action.

An examination of the testimony presented to the lower court as revealed by the bill of exceptions on the appeal from its judgment (Exhibit E) shows very clearly that notwithstanding the allegations of the complaint and the answer therein, the real and only controversy revolved about this oral agreement, the existence of which was alleged by the plaintiff and denied by the defendant.

Practically at the inception of the trial, the attorney for the plaintiff in that action (appellant here) stated to the court as follows:

“We might state here, if your Honor please, in view of the turn this case has now taken, that these questions as to the purchase of this property by the Marshalls, and matters relative to the second deed of trust, \$2445.00 deed of trust, might be immaterial to—irrelevant to

our present action, but there is nothing in there about it being part of the agreement, but, however, it is rather immaterial, I think. The crux of the matter is getting back to the agreement had between Daniel A. McColgan and the plaintiff as to the sale.” (Exh. E, p. 101.)

The complaint set up an oral contract and alleged the breach of it, and some other matters which were pleaded by way of inducement and for the purpose of showing that the plaintiff should have the threatened sale of the land postponed until the rights of the parties under that *alleged oral agreement* could be determined. But whether or not such other matters may be considered as having been pleaded by way of inducement, still the abandonment by the attorney of the plaintiff of all matters in the complaint concerning the sale of the land to Marshall and all questions concerning the rights and liabilities of all parties to the deed of trust for \$2455.00 certainly had the effect of limiting the matter to be determined by the Superior Court to those matters strictly in issue under the pleadings less all of such matters as were abandoned by the attorney and thereby eliminated from the case.

In this connection, it may again be called to the court's attention that the action had already been dismissed as against the defendants, R. S. Marshall and wife, and the trial actually proceeded against Reginald McColgan, Daniel A. McColgan and Eustace Cullinan only.

That Daniel A. McColgan, Reginald McColgan and Eustace Cullinan, respondents on the appeal from the decision of the Superior Court (appellees here) similarly regarded the issues before the Superior Court as having narrowed down to the question of the existence or nonexistence of the oral agreement, appears very clearly from the following extracts from their brief on appeal to the District Court of Appeal (Complainants' Exhibit 3):

Page 6:

“Lineker in his complaint (Paragraph V, Tr. Fols. 19 to 31) alleged an oral agreement by McColgan to purchase the Crittendon title for Lineker's benefit, and that oral contract is the whole basis of the cause of action pleaded by Lineker.”

Page 13:

“Lineker in his complaint did not plead the terms of the first deed of trust and did not allege that under the terms of that deed of trust, as he contends on this appeal, that McColgan was prohibited from acquiring the Crittendon certificate for McColgan's use or benefit.”

Page 15:

“Most of the evidence in the case turns upon the issue whether McColgan agreed orally to buy the Crittendon certificate for Lineker's benefit.”

Pages 15 and 16:

“Respecting the execution of the promissory note for \$2455, plaintiff alleges in his complaint

(Tr. fols. 17-19) that prior to the sale under the first deed of trust it was agreed between Lineker and McColgan that for the purpose of securing McColgan, in case he should be made to pay any of the liens alleged to be subsisting against the real property and which were not secured by the first deed of trust, Lineker would execute to McColgan his note for \$2455 and the second deed of trust.

The trial court found that no such agreement was made respecting the \$2455 note (Finding XII, Tr. fols. 267-270) * * *."

Page 43:

"We have seen that Lineker did not plead the language of the deed of trust as the basis of his cause of action, but relied in his complaint exclusively on McColgan's alleged oral agreement to buy the Crittendon certificate for Lineker's benefit. (See Par. V of the complaint, Tr. fols. 19 to 31.)

* * * It is obvious, that if a new trial were to be granted in this case, plaintiff could not prove the alleged agreement, except by oral evidence."

Page 44:

"But Lineker contends that McColgan took the legal title to the land as trustee for him by reason of the oral promise alleged in the complaint. That is the real issue presented by the pleadings and the theory on which the case was tried. The complaint alleges that this oral agreement was made prior to the purchase of the Crittendon certificate and also alleges that McColgan's agreement 'to repay himself for the monies thus expended by him out of the monies coming into his hands from said trustee at said trustee's sale', and that McColgan there-

after purchased the Crittendon certificate in accordance with that oral agreement.”

Page 60:

“In the first place, the question whether McColgan was prohibited by the deed of trust from acquiring the Crittendon certificate for his own benefit is not an issue in this case. The terms of the deed of trust were not pleaded. Lineker in his complaint, relied solely and exclusively on the oral promise which he alleges McColgan to have made to purchase the Crittendon title for Lineker’s benefit (see the complaint, paragraph V, Tr. fols. 19 to 30). On that alleged oral agreement Lineker’s entire cause of action rests.”

Page 11:

“No remedy is sought against the defendants R. McColgan and Eustace Cullinan except an injunction restraining the sale under the second deed of trust, in which they were trustees, a sale which has already taken place, and as they are not involved in the accounting matter, it seems so obvious as to require no argument that as to them the judgment must be affirmed. The real parties on this appeal are Lineker and Daniel A. McColgan.”

That such was the view of the appellants in their action up to the very time that the cause was submitted to the District Court of Appeal for its decision, appears from the oral argument of Mr. Harwood, who appeared on their behalf, (which oral argument was subsequently printed and filed with that court and is Complainants’ Exhibit 1.

herein), concerning the issues of the case. He states in his argument as follows:

Page 5:

“The purpose of this action was this: It was alleged in the complaint, and *this is the gist of the complaint*, that when D. A. McColgan bought the Crittendon certificate of sale from Crittendon on the 15th day of July, 1914, that he did so under an oral agreement with plaintiff that he would buy it for the benefit of Fred Lineker. Certain testimony was introduced by Mr. L. L. Dennett, an attorney of Modesto, to that effect. Mr. Dennett’s testimony, I think your Honors will see, is very indefinite as to whether there was an understanding, and as to the terms of the alleged understanding.” (Page 5.)

Page 6:

“The transactions themselves which took place on September 2, 1914, are absolutely inconsistent with the plaintiff’s claim in the case that there was any such oral agreement at all.”

Page 14:

“On this appeal for the first time the contention is advanced in the brief for appellant that under the deed of trust Daniel A. McColgan could not purchase the certificate of sale for his own benefit. That contention was not made in the trial court, could not have been made under the issues in the case and is entirely outside of the issues.”

Page 19:

“That the contention as to whether or not this clause of the deed of trust prohibited Daniel A. McColgan from buying for his own benefit the certificate of sale is not material,

since it is without the issues in this case, and that point is fully made in the respondent's brief. *The complaint in this case is based on the theory that Daniel A. McColgan purchased the certificate of sale for the benefit of plaintiff and that he would be reimbursed therefor.* Mr. Dennett gave testimony regarding this alleged oral agreement. Each time it was somewhat different, but that was the effect of the alleged oral agreement, which was denied by Mr. McColgan. There is no allegation in the complaint to the effect that the purchase of the certificate of sale was in pursuance of any term or provision of the deed of trust. The deed of trust is not set forth in the complaint. This contention was never made in the trial court."

Page 20:

"No legal question arose in the trial court or was presented by the pleadings in the case as to whether or not Daniel A. McColgan had the right to purchase the certificate of sale under the terms of the deed of trust. Certainly the deed of trust itself doesn't support the testimony as to the alleged oral agreement. *Mr. Dennett testified to an oral agreement.* The deed of trust is not evidence in support of that claim. *That was the only issue in the case.* The deed of trust was not evidence in support of that alleged oral agreement and the deed of trust was not part of the complaint."

Page 21:

"Of course it was incumbent upon the plaintiff to make out his case. If the plaintiff wished to claim that McColgan could not, under the terms of the deed of trust, purchase the Crittendon certificate of sale for his own benefit, he should have alleged the terms of the deed of trust in his complaint and stated that Mc-

Colgan bought this certificate pursuant to the deed of trust. The complaint alleges McColgan bought the sheriff's certificate of sale from Crittendon and that he did so *under an oral agreement, and that is the issue presented by the complaint.*'

It is admitted to be a fact that all parties to this action in their briefs filed in the lower court, as well as in their briefs filed with the District Court of Appeal, did discuss at considerable length the proposition that under the terms of the deed of trust, Daniel A. McColgan was prohibited by reason of the relationship existing between himself and the Linekers from purchasing the Crittendon certificate of sale in hostility to them, or otherwise than as their trustee, voluntary or involuntary as the case might be. Be that as it may, it remains incontrovertible that *the only question of fact actually litigated was that concerning the existence of the alleged oral agreement* and that the only question of law was the one just referred to.

The relief sought in action No. 5344 narrowed down at the trial as it was, was solely and only an order restraining R. McColgan and Eustace Cullinan from making a sale under the deed of trust for \$2455.00, on the ground that Frederick V. Lineker and not Daniel A. McColgan was the owner thereof, a sale which as a result of action No. 5353 to which neither of the Linekers were parties and by which they were not bound, had taken place long before the conclusion of action No. 5344.

In this action, on the other hand, the appellants seek to have it declared that the McColgans and Eustace Cullinan are legally obligated to account to these appellants for the excess of the sum of \$14,000.00 received by them at the sale under the deed of trust of June 20, 1919, in excess of the moneys actually due Daniel A. McColgan thereunder at the time of such sale; that the second deed of trust, for \$2455.00, was given without consideration and is, therefore, null and void; that all transfers of the property subsequent to the sale under said deed of trust are null and void, because without consideration and in fraud of the rights of these appellants; that the plaintiffs be declared the lawful owners of the property; and that an account be taken of all monies received by Marshall as trustee for Frederick V. Lineker.

It is apparent, therefore, that the issues upon which action No. 5344 was actually tried, and the relief sought therein, differ vitally and essentially from the facts pleaded and the relief sought and the issues made in and by the amended bill of complaint herein and the answers.

In the light of the foregoing facts, all of which are established by documentary evidence, appellants herein make the following contentions with respect to the effect of the judgment in action No. 5433:

It does not constitute a bar to the maintenance of this action against either of the McColgans or

against Eustace Cullinan because the only question of fact involved therein was the existence or the non-existence of the alleged oral agreement of Daniel A. McColgan to purchase the Crittendon certificate for the benefit of Frederick V. Lineker personally, a question not even remotely in issue under the pleadings herein.

However broad the issues may have been as framed by the pleadings in that action, they were narrowed down by the attorney for the plaintiff therein by withdrawing all other contentions. We shall hereafter cite authorities demonstrating that where issues tendered by pleadings have been thus narrowed down in the action, the judgment therein will be an estoppel or bar in any subsequent proceedings with respect to the issues remaining in the case and to those only.

Appellants maintain upon the same ground that the determination by the District Court of Appeal in affirming the judgment of the Superior Court went beyond and outside of the issues in purporting to hold that under the terms of the deed of trust Daniel A. McColgan had a right to purchase the Crittendon certificate in hostility to the defendant Frederick V. Lineker. As has been shown, the respondents upon that appeal (Daniel A. McColgan, R. McColgan and Eustace Cullinan) steadfastly maintained what we assert to be the fact, namely, that the only issue in action No. 5433 was

the question as to the existence or non-existence of the oral agreement referred to.

It is obvious of course that in the amended bill of complaint herein, no reference whatever is made to this oral agreement and it forms no part of the alleged ground of recovery upon which these appellants seek a decree. Furthermore, even if it be conceded, for the sake of argument, that the right of Daniel A. McColgan to purchase the Crittendon certificate in hostility to Frederick V. Lineker has passed into the realm of adjudicated issues, it still remains the fact that McColgan's right to purchase that certificate in hostility to *Norvena Lineker* has never been passed upon.

The gist of the bill of complaint herein on the other hand, is found in the allegations therein contained to the effect

(a) That prior to the sale of September, 2, 1914, the McColgans "unlawfully and fraudulently claimed that they were entitled under said deed of trust (of June 20, 1910) to a sum greatly in excess" of the amount actually due them;

(b) That they claimed in excess of \$10,000.00;

(c) That they fraudulently threatened to sell under the deed of trust if Frederick V. Lineker failed to pay them the sum of \$10,000.00;

(d) That Daniel A. McColgan and R. McColgan procured Frederick V. Lineker to cause a bid of \$14,000.00 to be made at the sale upon the fraudulent representation that they, the McColgans, would re-

pay to him and account to him for all monies received by them in excess of what was actually due the McColgans or either of them under the deed of trust;

(e) And that after the sale R. S. Marshall and wife wrongfully and unlawfully and in fraud of the appellants' rights made or attempted to make a certain deed of trust to R. McColgan and Eustace Cullinan as trustees for Daniel A. McColgan in the sum of \$2455.00 or thereabouts, which said deed of trust was entirely without consideration.

Certainly any reasonably close examination of the judgment roll and of the bill of exceptions in action No. 5344 will reveal that the existence or non-existence of a consideration for the deed of trust in the sum of \$2455.00 was at no time in issue.

It is true that Finding X (Exhibit A, page 87) is to the effect that there was account stated between Frederick V. Lineker and Daniel A. McColgan on September 2, 1914, whereby and wherefrom it appears that the sum of \$2455.00 was due from Lineker to McColgan. Perhaps nothing in the findings better illustrates our contention that the Superior Court travelled far afield and clearly outside of the actual issues in making its findings and giving its judgment. The pleadings in that case will be searched in vain for any reference or suggestion relating to any account stated. Equally without result will the bill of exceptions be searched for anything which would possibly justify such a conclusion. How the Superior Court could pos-

sibly have made such a finding when counsel for the plaintiff in that case at the time of trial specifically and clearly, in the language already quoted, withdrew and abandoned all matters in the complaint concerning the rights and liabilities of any of the parties with respect to or pertaining to the said deed of trust for \$2455.00 thereby eliminating them from the case, is quite beyond comprehension. Certainly the decisions which we cite clearly prevent that finding, the judgment founded thereon and the affirmance thereof from being considered a prior adjudication of the question of whether there was any consideration for the \$2455.00 note and deed of trust.

Appellants further contend that in addition to the reasons already given, the judgment in action No. 5344 could not possibly be a bar as against Frederick V. Lineker as administrator of the estate of Norvena Lineker, for the reason that Norvena Lineker was not in person or by personal representative a party to that action, and judgment therein does not purport to bind her.

Furthermore the issues raised by the amended bill of complaint herein and the first special defense thereto of the McColgans and Eustace Cullinan (Tr. 3964, p. 42) will, in the event of a trial upon the merits, inevitably raise and present the legal issue as to whether Crittendon ever acquired any interest or title by virtue of the levy of his writ of execution in the land, title to which had previ-

ously been conveyed out of Norvena Lineker to R. McColgan and Eustace Cullinan.

In other words, the trial court would have to determine whether a writ of execution against the grantor under a deed of trust, who has conveyed his entire interest and estate to trustees, acquires any interest or estate in the land so that after a sheriff's sale upon execution in the manner provided for a sale, not of personal property, but of real property, becomes entitled to any surplus of the price received upon sale of the property under the deed of trust. It cannot be contended that any such issue of law was presented to or decided, either by the Superior Court or by the District Court of Appeal. And yet, as we will show, it was legally impossible for Daniel A. McColgan to have acquired any interest or any estate whatsoever in the land by reason of his purchase of the Crittendon judgment and certificate of sale which could have survived the sale by the trustees under the original deed of trust and which could have entitled him to such surplus.

IV.

THE BILL OF COMPLAINT WAS IMPROPERLY DISMISSED ON THE GROUND OF LACK OF EQUITY.

It seems highly probable that the decree of dismissal, in so far as the dismissal was ordered for lack of equity, was inadvertently made, unless per-

chance it was predicated upon the court's conclusion that the action was barred.

At no time during the proceedings in this cause was it ever contended or suggested that the bill lacked equity. The point was apparently never raised nor mentioned at any time prior to the signing of the decree of dismissal. No motion to dismiss was interposed by any of the appellants on any ground whatever. On the contrary, all immediately answered the bill.

Appellants are aware of the rule that a court may of its own motion dismiss a bill which obviously and clearly fails to state a cause of action. But this certainly is not such a case. The allegations of the bill which must be taken as true in considering the propriety of the order of dismissal certain state facts which if proven would entitle the appellants to relief. That this is the case is so patent from the foregoing recital of the contents of the bill, that it seems utterly unnecessary again to recite the statements of fraud, unfair dealing, overreaching, abuses of confidence, and partial or entire lack of consideration for the various deeds of trust and the other conveyances.

It is sufficient to say that the decree of dismissal cannot be sustained on the theory that it lacks equity.

V.

THE LAW.

A. It was Legally Impossible For Daniel A. McColgan to Have Acquired an Equity of Redemption or any Other Estate or Interest in the Land by Reason of His Purchase of the Crittenden Certificate of Sale That Survived the Sale by the Trustee Under the Original Deed of Trust.

The first thing to be particularly noted with relation to our contention on this point, is the difference in California between a deed of trust and a mortgage. Until the case of

Weber v. McCleverty, 149 Cal. 316,

was decided by the Supreme Court of California, there was much confusion in the decisions as to the legal effect of such deed of trust, the impression generally prevailing theretofore being that a deed of trust was practically and in effect a mortgage with a power of sale. The case of

Weber v. McCleverty

finally settled the law in California, and the rule there announced is now a rule of property in California; and this rule in effect is: when a deed of trust covering land is given to secure the repayment of money, the trustee named in the deed thereby acquires the absolute title to the land owned by the trustor at the time of the making of the deed of trust, so far as is necessary to enable him to convey such land to the purchaser at the trustee's sale free of all right, title, interest or estate of the trustor or anyone claiming under or through him; that after the making of such trust deed it is legally

impossible for the trustor by any act of his voluntary or involuntary, to cause a lien or encumbrance to be put or cast upon the property covered by the deed of trust, which is not completely wiped out by the sale made by the trustee in pursuance of the powers to sell given him by the deed of trust, and when such sale is made by the trustee, the purchaser acquires the full legal and equitable title which was formerly owner by the trustor at the date of and immediately prior to the making of the deed of trust, unaffected by any act of the trustor subsequent to the date of the deed of trust and unaffected by any judgments against the trustor or by any contingent judgment liens, subsequent in point of time to the deed of trust.

The leading case on the subject in California and the one which settles the law is the above cited case of

Weber v. McCleverty,

wherein the court reviews the former cases on the point and says:

“In legal effect, a deed of trust does not create a lien or encumbrance on the land, but conveys the legal title to the trustee. In order to execute the trust he must be by the deed so far invested with the absolute title to the land as is necessary to enable him to convey it to the purchaser at the trustee’s sale free of all right, title, interest, or estate of the trustor, or of any one claiming under or through the trustor by virtue of any transaction occurring after the making of the trust deed. The deed of trust, therefore, vests in the trustee, for the

purposes of the trust, the absolute legal title to the entire estate held by the trustor, immediately prior to its execution and that estate must remain in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt. * * *

The trustee holds title to the entire estate for the purpose of conveying it when required in execution of the trust, and he cannot at the same time hold as trustee a lien on the same estate, for that would necessarily imply that the title to the estate was not vested in him. The estate of the trustee in the land is consequently not a lien thereon, even as that term is defined in section 1180 of the Code of Civil Procedure, conceding it to be in force. It is not a charge on the land, but the very land itself.

A mortgage or other encumbrance on land does not transfer the title, but leaves it vested in the mortgagor or owner. A homestead attaches to whatever estate in the land may be vested in one or both of the spouses. Consequently, when declared on land previously mortgaged or encumbered, it attaches to the legal title, which then becomes the homestead interest, and the mortgage or encumbrance may properly be said to be a subsisting lien or encumbrance on the homestead and as such it would be governed by section 1475. But it is not so with a deed of trust. It transfers the legal title to the trustee, and, as the homestead applies only to the title vested in one or both of the spouses, and does not affect titles vested in third persons, it follows, that the legal title thus vested in the trustee forms no part of a subsequently declared homestead, and that the deed of trust, or the title of the trustee, is not a subsisting lien or encumbrance on the homestead interest.

The decisions of this court, with one exception, are in harmony with these views. In *Sacramento Bank v. Alcorn*, 121 Cal. 379 (53 Pac. 813), speaking of the character of a deed of trust, the court says: 'Under the decisions, it is practically, though not in legal effect, little more than a mortgage with power to convey. The legal title passes, but it conveys no right of possession, and the trustor may, remain in possession, and until the execution of the trust, may maintain an action to recover possession. * * * The trustor may file his declaration of homestead and hold the premises as such against his creditors who are not secured by the trust deed. * * * While we may say that the title passes, none of the incidents of ownership attach, except that the trustees are deemed to have such an estate as will enable them to convey.' Similar expressions are found in *Tyler v. Currier*, 147 Cal. 36, (81 Pac. 310). In *Hodgkins v. Wright*, 127 Cal. 688 (60 Pac. 431), in speaking of such deeds, and evidently intending to epitomize the above passage from *Sacramento Bank v. Alcorn*, to which reference is made, the court says: 'In effect, they are mortgages with power to sell.' The statement that they are in effect, or practically, mortgages with power to sell, means only that the practical result of the enforcement of either is the same: that is, the estate held by the mortgagor at the time of the execution of the mortgage, in one case, and that of the trustor at the time of the execution of the deed of trust, in the other case, are by the respective conveyances of the sheriff on foreclosure sale, and of the trustee on trustee's sale, transferred to the respective purchasers at such sales and that in the meantime the mortgagor or trustor, respectively, have the use and enjoyment of the property. All this is true,

and yet the entire estate of the trustor, for the purposes of the trust, must during the intervening period be vested as an estate, and not as a lien, in the trustee, otherwise he could not legally convey it in execution of the trust. The case which seems to hold that a deed of trust is an encumbrance and not an interest in the land is *Williams v. Santa Clara Min. Assn.*, 66 Cal. 200 (5 Pac. 85). The question there arose whether section 1192 of the Code of Civil Procedure requiring any person 'claiming and interest', in land upon which a building was being erected, to give notice that he will not be responsible for the same in order to avoid the enforcement of a lien for the cost of the building against such interest, was applicable to a deed of trust. The court in effect held that, so far as that section is concerned, the estate created by the trust deed should not be deemed an interest in the land, so as to require the trustee to give such notice, and said that the deed should be 'treated' as an encumbrance, and that, the deed having been recorded before the building was begun, it was exempt from the lien by the provisions of section 1186 of the Code of Civil Procedure.

The court merely says that in the application of section 1186 and 1192 of the Code of Civil Procedure a deed of trust should be 'treated' as an encumbrance. This is far from deciding that it is in legal effect an encumbrance; indeed, the context implies an admission that it has no such legal character, and is to be so considered only when, in a court of equity, the ultimate results are to be considered, rather than legal forms and rules. The point received no thorough treatment in the opinion, the code definitions were not mentioned, and although we do not in the least impugn the authority of the decision as a construction of the section of

the code there involved, we do not consider ourselves bound to adopt the doctrine as a general principle, and, in the face of the provisions of the Civil Code above given, apply it also to section 1475 of the Code of Civil Procedure.

The claim or interest of the trustees, not being either a lien or encumbrance on the homestead, and the homestead right being subsequent to the deed in point of time and subordinate to it in all respects, it follows that the conveyance of the trustee related back to the estate of the trustor at the time he executed the trust deed, and transferred to the purchaser the entire right, title, interest, and estate in the land then vested in the trustor, thereby completely extinguishing the homestead.”

In

Athern v. Ryan, 154 Cal. 554-6,

the court said:

“the principle on which that case (*Weber v. McCleverty*, 149 Cal. 316), rests is that a deed of trust is not a lien or encumbrance” etc.

In

Bryant v. Hobart, 44 Cal. App. 315-317,

the court by Kerrigan, J., says:

“We think the point has been put at rest by the case of *Weber v. McCleverty*, 149 Cal. 316 (86 Pac. 706); *McLeod v. Moran*, 153 Cal. 97 (94 Pac. 604), and *Athern v. Ryan*, 154 Cal. 554 (98 Pac. 390). The effect of such a deed, says the court in the first of these cases, is to convey the legal title to the trustee, who is thereby vested with the absolute legal title to the premises so far as is necessary to enable

him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustors, or anyone claiming under or through them. (2) Under these authorities we have no doubt that such a deed of trust transfers for the purpose of the trust all possible claims of the trustors in the property conveyed, including a claim of homestead, and vests in the trustee the absolute legal title to the entire estate held by the trustors at the time of the execution of the trust deed, and that the title must remain in the trustee for that purpose until the trust is either executed through a sale upon default in the payment of the debt secured by the deed of trust, or is terminated by the payment of such debt or other method provided by law. (3) The declaration of homestead in the case at bar was made prior to the execution of the trust deed, but it is immaterial whether it was declared prior or subsequent thereto." (*Athern v. Ryan*, supra.)

Now if Crittendon had held his certificate of sale, and his judgment until the trustees' sale on September 2, 1914, any so called lien he might have acquired would have been foreclosed and his interest wiped out by that trustee's sale.

The fact that Crittendon assigned his certificate of sale and his rights thereunder to Daniel A. McColgan, gave no greater virtue to that certificate or the so called lien thereof than if Crittendon had retained it himself. Any interest tentative or conditional in these lands that Daniel A. McColgan acquired by the purchase of the Crittendon certificate and the later sheriff's deed was foreclosed and

wiped out by the trustees' sale on September 2, 1914, to R. S. Marshall.

Therefore, it would seem to follow as a matter of law that Daniel A. McColgan did not acquire an equity of redemption in these lands by that purchase. How then could the lower court be correct in stating in this opinion as follows:

“First, that under the execution sale and sheriff's deed, McColgan acquired the equity of redemption in the lands in controversy, in his own right, and became entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed, above the indebtedness secured thereby, to which the plaintiff would otherwise have been entitled.”
(Tr. p. 30.)

It follows necessarily from the decisions cited and quoted from that Norvena Lineker, after she executed the deed of trust of June 20, 1910, had no *title or estate*, either legal or equitable in the premises conveyed. All that remained in her were certain purely contractual rights, to-wit:

a. To have reconveyance made to her upon payment of all obligations, performance of which was secured by the deed of trust; and

b. To receive from the trustees after sale, if any, under the deed of trust the surplus of the sale price over and above the amount of her indebtedness to the beneficiary under the deed of trust or to the trustee as such.

Hence the purported levy *upon the land* of the writ of execution under the judgment obtained by Williams against Norvena Lineker, could not in the very nature of things have created a lien upon the land, as against her or at all. Her contractual rights above enumerated obviously could not possibly be reached by that levy. No other levy was ever made. The only manner in which any surplus after sale under the deed of trust could have been reached would have been by means of a levy made upon the trustee after the funds derived from the sale had come into his hands.

This being the case, the levy of execution, the delivery of the purported sheriff's certificate to Crittendon, and the issuance of the sheriff's certificate to D. A. McColgan, after he purchased Crittendon's certificate, were wholly abortive in so far as it was attempted by means thereof to reach any property or rights of Norvena Lineker.

B. The Modern Doctrine of Res Judicata Prevents the Operation of the Bar in This Case.

It is respectfully submitted that the rigor of the ancient rule of *res judicata* has been greatly relaxed by the more recent decisions of the Supreme Court and the several Circuit Courts of Appeal, also by most of the State Supreme Courts, including the Supreme Court of California.

It is conceded that there has been very little relaxation of the statement of the rule where the

second cause of action is based upon the same cause of action that was tried in a former suit, but the severity of this rule has in fact been greatly modified by confining the estoppel of the judgment in the former suit to *the precise question distinctly put in issue and directly determined*. This point was discussed and the rule definitely settled by the Supreme Court in the recent case of

State of Oklahoma v. State of Texas, 256
U. S. 70 (41 L. Ed. 420),

and the rule stated as follows:

“The general principle, applied in numerous decisions of this court, and definitely accepted in *Southern Pacific R. R. v. United States*, 168 U. S. 1, 48, 49; 18 Sup. Ct. 18; 42 L. Ed. 355, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies whether the second suit be for the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited on page 49 of 168 U. S., on page 27 of 18 Sup. Ct. (42 L. Ed. 355).

“This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person

and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.”

Moreover, the recent cases hold that if the first cause of action was brought upon a wrong theory, the plaintiff is now permitted to bring a second action based upon the right theory and be not estopped by reason of the first judgment. The rule on this point was recently declared by the Supreme Court in

Southern Pacific v. Bogert, 250 U. S. 483,
in an excellent opinion wherein it said:

“And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory because unsupported by facts, should not be permitted to recover on another for which the facts afford ample basis.”

If the second suit is not founded on the same identical cause of action as that tried in the first action, the court will analyze the first action very closely to see what was actually and properly at issue, and permit the judgment in the first action to become an estoppel only as to the matters that were strictly within the issue of the first action and properly determined by the court, and will disregard any findings upon facts which were not strictly in issue.

The modern rule on this point was very recently declared by the Supreme Court in

State of Oklahoma v. State of Texas, 256
U. S. 70,

in the following language:

“But we concede that, in a subsequent suit upon a different cause of action, the question whether the matter decided on the former occasion was within the issues then proper to be decided, or was presented and actually determined in the course of deciding those issues, is open to inquiry, and that, unless it be answered in the affirmative, the matter is not *res judicata*.”

Two recent decisions of the Supreme Court of California are to the same effect. In

Williams v. McDonald, 180 Cal. 546,
the court said:

“A judgment in order to operate strictly as a bar to a subsequent action must have gone to the merits of the subsequent action. This is the full extent of the doctrine of such cases as *Taylor v. Castle*, 42 Cal. 367; *South San Bernardino etc. Co. v. San Bernardino Bank*, 127 Cal. 245, and *Heilig v. Parlin*, 134 Cal. 99, cited on behalf of the plaintiff. If, for example, the plaintiff has mistaken his legal remedy or the proper form of action, and judgment goes against him for that reason, the judgment is no bar to a second action rightly brought.”

In

Lang v. Lang, 182 Cal. 765-767,
the court said:

“Upon the first question it is contended by the appellant that the final decree of divorce

constitutes a conclusive judgment disposing of the community property of the parties to that action, and that such judgment is not subject to attack at the instance of the plaintiff herein. In support of this argument the appellant relies upon the numerous decisions of our appellate courts declaring not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated. This rule, while generally true, is not always applicable literally. (*Brown v. Brown*, 170 Cal. 1-6.) ‘What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff’s complaint. (*Concannon v. Smith*, 134 Cal. 14-16.) Accordingly it has been held that a finding made by a court of a fact upon which there is no issue in the case before it, and which does not enter into or form the basis of the judgment rendered in the action, is not admissible in another action between the same parties, either as an admission or by way of estoppel. (*Bank of Visalia v. Smith*, 146 Cal. 398.) As long as matters are not tendered as issues in the action they are not affected by it. (*Brown v. Brown*, supra.)”

Moreover, another rule of the more liberal modern doctrine now prevailing is, if there be any uncertainty in the record of the former suit as to the precise questions which were actually put in issue and determined, the whole subject matter of the action will be at large and open to a new contention. This rule was declared by the Supreme Court in

Russel v. Place, 94 U. S. 606,
in the following language:

“But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.”

See also the very recent case of

Hottelet Co. v. Garden City Co. (C. C. A. 8th, 1922), 285 Fed. 693,

wherein the court, speaking through Sanborn, J., said:

“Another rule is that where the record is such that there is or may be a material issue, question or matter in the second suit upon a different cause of action which may not have been raised, litigated or decided in the former action, the judgment there in does not constitute an estoppel from litigating that issue, question or matter unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question or matter in dispute was actually and necessarily decided in the former suit.”

Since the enactment of the New Equity Rules the tendency of the courts is to postpone decision on all pleas such as *res judicata* until after the

hearing of the facts in the second action. The theory is that the plea of former adjudication usually involves close questions of fact and not merely questions of law.

Boyd v. New York & H. R. Co., 220 Fed. 174.

It is almost impossible to determine in advance of the trial of the second action whether or not the questions of fact in the first action are the same questions of fact to be determined in the second action. Two recent decisions supporting this contention are:

Keown v. Hughes (C. C. A. 1st, 1920), 265 Fed. 527-575,

where the court said:

“But frequently, perhaps generally, former adjudication involves close questions of fact, and not mere questions of law. Clearly there is not enough in the record before us to justify the attempt of the court below to determine this issue, on a motion to dismiss for want of equity.”

In

Graff Furnace Co. v. Scranton Coal Co.,
(C. C. A. 3rd, 1920), 266 Fed. 798-802,

the court said:

“The true test of identity of causes of action is the identity of the facts essential to their maintenance.”

Another decision which very strongly supports our theory is that of

Cromwell v. County of Sac., 94 U. S. 351.

It appears from the decision in that case that an action had been brought by the assignee of certain coupons attached to bonds issued by the county. In that action judgment was rendered for the defendants and that judgment was affirmed by the United States Supreme Court, which held that the evidence showed that the bonds were fraudulent in their inception and that the plaintiff could not recover inasmuch as he had not affirmatively proved that he paid value therefor.

Thereafter the assignor of the bonds involved in the first action filed another action to recover on some other coupons attached to the same bonds. The defendants pleaded *res judicata* and maintained that the judgment in the earlier action was a bar to the second action. The Supreme Court, however, overruled this contention, saying in the course of its opinion as follows:

“Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds, as against the county, must be held to estop the plaintiff here from averring to the contrary. But as the

bonds were negotiable instruments, and their issue was authorized by a vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a bona fide holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bonds and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was nothing adjudged in the former in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had."

It is respectfully submitted, therefore, that this court is bound carefully to examine all the evidence submitted in the plea of *res judicata* herein, and that upon such examination, it must reverse the action of the lower court in sustaining the plea of *res judicata* for the reason that the record discloses clearly that this action is not based upon the same facts or theory and does not seek the same relief as were involved and sought in action No. 5344. Material questions of fact and of law which did not enter into action No. 5344 at all and which indeed

under the pleadings could not have entered into it, are the very foundation of this pending action.

Whatever could possibly be said to controvert our statement, still it cannot be denied that at best, the validity of the plea of *res judicata* presents an extremely close question when viewed from the position of the defendants presenting the plea, and under such circumstances, the plea should not be sustained without a hearing upon the merits. If, after hearing, which will fully reveal all facts, it then appears that the plea is well taken, judgment accordingly may still be rendered without detriment, injury or harm of any kind or character to any of the parties to this action.

Dated, San Francisco,
March 11, 1925.

Respectfully submitted,

JOHN L. TAUGHER,

GLENSOR, CLEWE & VAN DINE,

Solicitors for Appellants.

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No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

<p>FREDERICK V. LINEKER, et al.,</p> <p style="text-align: center;">vs.</p> <p>R. S. MARSHALL, et al.,</p>	}	<p style="text-align: right;"><i>Appellants,</i></p> <p style="text-align: right;"><i>Appellees.</i></p>
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BRIEF FOR APPELLEE, EUSTACE CULLINAN.

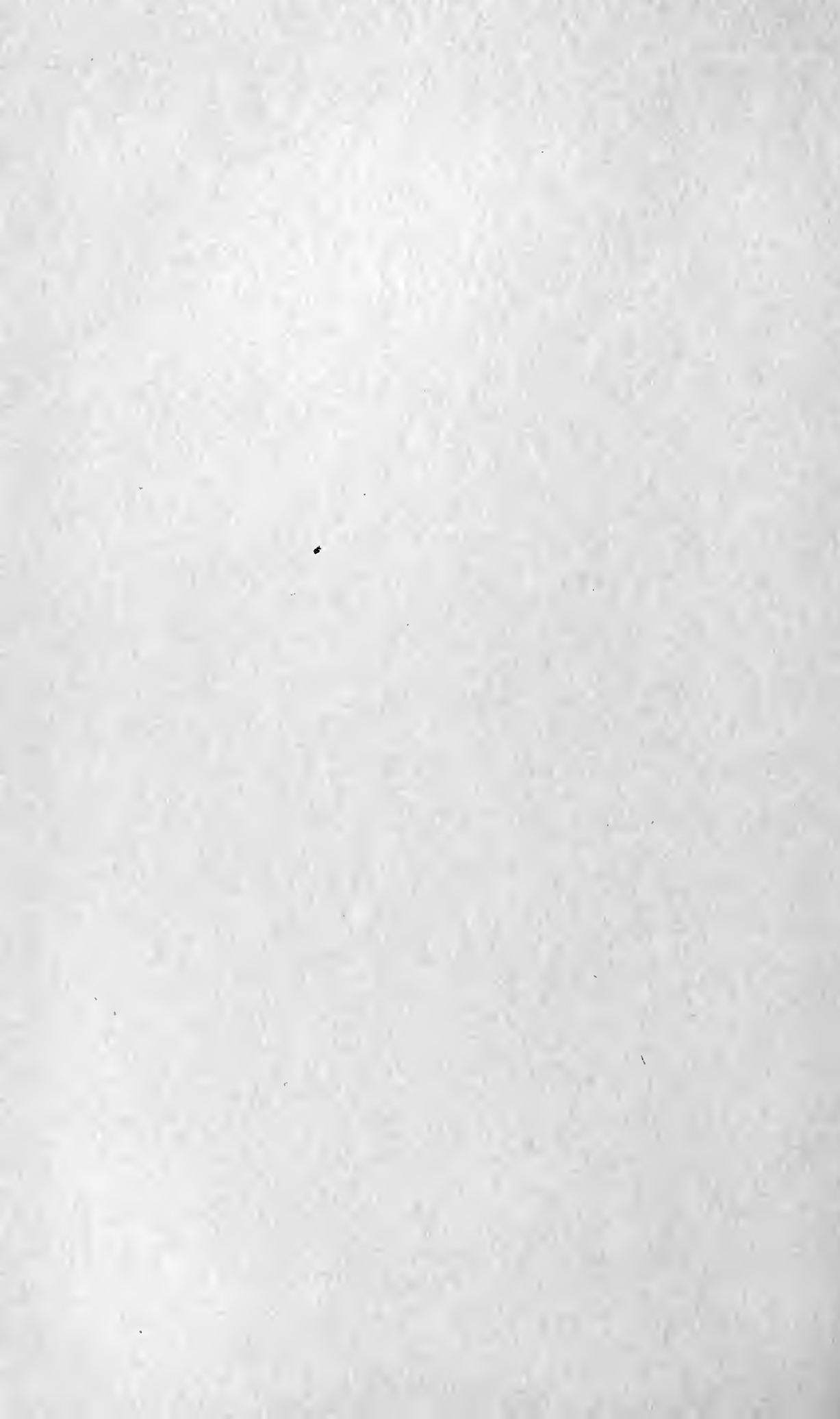
(Copy of opinion of District Court of Appeal in Lineker v. McColgan, 54 Cal. App. 771, is printed as an appendix to this brief.)

CULLINAN & HICKEY,

Phelan Building, San Francisco,

Solicitors for Appellee, Eustace Cullinan.

FILED
MAR 21 1925
F. D. MONCKTON
CL



No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER, et al.,

Appellants,

VS.

R. S. MARSHALL, et al.,

Appellees.

BRIEF FOR APPELLEE, EUSTACE CULLINAN.

So far as the present litigation is against the McColgans and Cullinan, it is a suit:

a. For an accounting of the \$14,000 received by D. A. McColgan as a result of the sale on September 2, 1914, under the first deed of trust dated June 20, 1910, raising the issues,

1. Whether McColgan on September 2, 1914, owned the equity in the land and was therefore entitled to the surplus of the \$14,000 after satisfying the indebtedness secured by the first deed of trust, and

2. If McColgan did not then own the land what was the amount of the surplus then due to Lineker?

b. To determine whether there was any consideration for the note for \$2455 dated September

2, 1914, and the second deed of trust securing it and whether Marshall wrongfully executed it. This necessarily involves the issues:

1. Whether D. A. McColgan actually gave consideration for the second deed of trust and note for \$2455, and

2. Whether there was more than that amount owing to Lineker out of the surplus of the \$14,000 derived from the sale under the first deed of trust.

c. For a decree that the sale under the second deed of trust was invalid. This depends entirely on the question whether any indebtedness secured by the second deed of trust was due to McColgan when the sale was made; and this in turn depends on the question whether McColgan or Lineker owned the equity in the land and by reason thereof the surplus of the \$14,000 derived from the sale under the first deed of trust.

Plaintiffs' entire case depends, therefore, on the question whether or not Lineker or McColgan owned the equity in the land and therefore the surplus of that \$14,000 on September 2, 1914, and, incidental thereto, whether or not there was a consideration for the second deed of trust and \$2455 note secured by it.

The whole issue indeed, is whether McColgan owed Lineker or Lineker owed McColgan on September 2, 1914, after the sale under the first deed of trust and when the second deed of trust was executed.

If those basic questions of law and fact, which are really identical, have heretofore been litigated between the parties or their privies to a final determination in another action, the defendants' plea of *res adjudicata* must be sustained.

There were two pleas of *res adjudicata* before Judge Rudkin, one based on action No. 5353, Marshall v. McColgan et al., which was tried before Judge Fulkerth in the Superior Court of Stanislaus County, and the other based on action No. 5344, Lineker v. McColgan et al., which was tried before Judge Langdon in the Superior Court of Stanislaus County. In his memorandum opinion sustaining the plea of *res adjudicata* Judge Rudkin refers only to the judgment in action No. 5344, because that was sufficient; but the record in action No. 5353 was also in evidence, and is before the court on this appeal, and that record, quite by itself, is sufficient to support Judge Rudkin's decision from which this appeal is taken.

THE MARSHALL CASE, ACTION NO. 5353.

In their complaint in the case at bar, the Linekers, appellants herein, allege that when the land was sold under the first deed of trust on September 2, 1914, it was bought by R. S. Marshall for \$14,000; but they allege that Marshall took the title as representative and trustee of the Linekers. The note for \$2455 to Daniel A. McColgan, and the second

deed of trust securing it, both dated September 2, 1914, (after the sale under the first deed of trust) were executed by R. S. Marshall and his wife. In other words, the Linekers, according to their own theory and allegations, selected Marshall to hold the title, execute the note and deed of trust, and deal with the trustees and the lender under the second deed of trust. The defendant, Eustace Cullinan, first came into the transaction when he was named as a trustee in the second deed of trust. There is no suggestion that he, in particular, had any dealings with the Linekers prior to that time or that he knew them in the matter at all. The accountability of the trustees under the second deed of trust was to D. A. McColgan, as lender, and to R. S. Marshall, as borrower. They were not obliged and had no right to look behind Marshall to the Linekers. The judgment in the Marshall case (action No. 5353 before Judge Fulkerth) therefore binds the Linekers as well as Marshall, and to the same extent. If the issues presented by the pleadings in the case at bar were adjudicated as between Marshall and the McColgans and Cullinan in action No. 5353, the judgment in that action bars the Linekers in this case as effectually as if the Linekers themselves had been named as parties in action No. 5353.

Some two years after Marshall had executed the note for \$2455 and deed of trust of September 2, 1914, he defaulted and D. A. McColgan, the lender,

demanded that the trustees, as required by the deed of trust, publish a notice and sell the land.

Marshall then commenced action No. 5353 by filing a complaint in which he alleged the execution of the deed of trust of September 2, 1914, and the note for \$2455 secured thereby, and demanded an accounting from D. A. McColgan of the amount due, and attacked the consideration of that note, and asked that the sale be restrained until the amount due under the note and deed of trust of September 2, 1914, could be determined. In other words, the fundamental question in action No. 5353 was the same as the fundamental question here; namely, whether there was anything due on the \$2455 note of September 2, 1914, at the time when the sale was threatened or made.

That action was tried on its merits before the sale was held.

Judge Fulkerth, after an accounting, adjudged that the amount so determined was secured by the deed of trust, and directed that the trustees proceed with the sale unless the amount so found to be due were paid prior to the sale.

The land was then sold to Peck for the amount so found due which was paid to D. A. McColgan.

In that litigation Marshall attacked the second deed of trust and the \$2455 note for a partial failure of consideration. He also alleged that neither he nor his wife had received any consideration.

Proof that there was nothing owing under the second deed of trust, or that it was without consideration, would have sustained his cause of action. He had his day in court. Neither Marshall nor his privies, the Linekers, (whose privity is fully set forth in their own amended complaint herein; see appellants' brief herein at pages 8 and 9 and 20) will be allowed in the case at bar to avoid the conclusive effect of the judgment in action No. 5353 by averring that they did not in the former litigation produce certain evidence or urge certain arguments or grounds of attack which they obviously might have laid before Judge Fulkerth if they had been disposed to do so. The parties to action No. 5353 being in legal contemplation the same as the parties in the case at bar (at least so far as the Linekers, the Marshalls, the McColgans, and Cullinan are concerned) the judgment in the Marshall case operates as an estoppel both as to those grounds grounds which were therein urged and as to those which might have been urged. True, in action No. 5353, Marshall did not urge that by acquiring the Crittenden certificate of purchase McColgan could not become owner of the land adversely to the Linekers and, therefore, that the surplus of the \$14,000 belonged to the Linekers and on that account there was no consideration for the \$2455 note of September 2, 1914, but there was nothing in the pleadings in the Marshall case to prevent him from so doing.

In *Cromwell v. County of Sac.*, 94 U. S. 351, the court said (pp. 352-353):

“In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment,

cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

“But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the findings or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel or a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the injury must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.”

The doctrine has been re-affirmed as late as November, 1923, in *Myers v. International Trust Co.*, 205 U. S. 64; 44 Supreme Court Reporter 86, and it has not been relaxed or “liberalized” by any of the decisions quoted on pages 52 to 58 of appellants’ brief as the most casual inspection of those authorities demonstrates.

Appellants in their brief at page 15 make a false and wholly gratuitous assertion that action No. 5353 was fraudulent and collusive. That action was as genuinely and aggressively litigated as this case has been and there is no warrant for suggesting otherwise. The reason why it was tried five days after it was commenced was that on the day when the order to show cause why a preliminary

injunction restraining the sale should not issue came on for hearing the suggestion was made and adopted that as that hearing involved precisely the same issues and evidence that would be presented later on the trial, and as both parties were as fully prepared as they were ever likely to be, the case should then and there be tried on its merits, so as to avoid a duplication of the work later. Celerity of that kind should be a ground for commendation rather than reproach.

However, no attempt has been made by the Linekers in their pleadings or in their evidence to discredit action No. 5353 as collusive; and, in any event, this court will not in this litigation listen to a collateral attack on the judgment in action No. 5353.

Appellants assert in their brief at page 14, that action No. 5353 "had for its object the defeating of the very purpose of the institution by Lineker himself of action No. 5344". On the contrary, action 5353 by Marshall had the same objective as action No. 5344 by Lineker. Both actions were aimed at preventing the sale and determining what amount, if any, was due on the \$2455 note of September 2, 1914. Neither action interfered with the other. Both were actually tried on their merits. The Linekers, in short, have already litigated *twice* the issues which in the case at bar they are seeking to litigate a *third* time. Defendant, Eustace Cullinan, is in this case only as a trustee under the

second deed of trust. With respect to him, and with respect to R. McColgan as trustee under the second deed of trust, the judgment in action No. 5353 is a complete defense to the case at bar. That judgment settled all the questions here involved connected with the second deed of trust, the note for \$2455, and the validity of the sale under the second deed of trust.

The case at bar is not a suit for an accounting of the proceeds of the sale under the second deed of trust, for that would be a ratification of the sale. It is a suit to annul that sale and to recover the land on the theory that the sale was invalid because when made there was nothing owing to D. A. McColgan on the \$2455 note and the deed of trust securing it.

THE LINEKER CASE, ACTION NO. 5344.

Let us now consider the scope and effect of the judgment in action No. 5344 which was tried before Judge Langdon and in which his judgment was affirmed by the District Court of Appeal in 54 Cal. App. 771. We have printed the opinion of the District Court of Appeal in that case as an appendix to this brief because it contains a clear and succinct statement of the pleadings and issues. From a perusal of that opinion, the court here will see that the issues in the case at bar have been completely adjudicated in action No. 5344.

Some point is made in appellants' brief, at page 17, that in action No. 5344 Frederick V. Lineker alone was a plaintiff and Norvena Lineker, his wife, was not a party, whereas, in the case at bar, both Linekers are parties. On page 17 of appellants' brief, the remark is made that Norvena Lineker's conveyance to Frederick V. Lineker was made on August 18, 1923. That is evidently a typographical error, because on page 6 of appellants' brief, the correct date of the transfer from Norvena Lineker to Frederick V. Lineker—August 18, 1913—is stated. In other words, prior to the commencement of either of the actions pleaded in bar, Norvena Lineker had conveyed the land to her husband, Frederick V. Lineker. Consequently, as she had thus put the title in Frederick V. Lineker and required the world to deal with him as owner, any judgment that binds Frederick V. Lineker binds Norvena Lineker.

Appellants, in their brief, almost concede the correctness of Judge Rudkin's decision sustaining the plea of *res adjudicata*. They say, at page 24, that they admit that a consideration of the pleadings in action No. 5344 "would tend to indicate that a number of the material matters set forth in the amended bill of complaint herein were litigated and passed upon by the Superior Court in action No. 5344", and they "as readily concede that the opinion of the District Court of Appeal in affirming the judgment of the Superior Court tends to support such a conclusion".

They attempt, however, to offset this admission, which they could hardly refuse to make, by the contention that both Judge Langdon, of the Superior Court, and the District Court of Appeal passed upon questions not in issue; and the burden of their contention is that the only issue actually tried and litigated in action No. 5344 was whether Daniel A. McColgan had entered into an *oral* agreement with the Linekers to purchase the Crittenden certificate of sale for the benefit of Lineker himself, and that none of the rights of Norvena was involved in that action.

The question at issue in that case was whether McColgan had acquired Lineker's equity in the land by virtue of the purchase of the Crittenden certificate and the delivery to Daniel A. McColgan of the sheriff's deed for on that question depended the right to any surplus of the \$14,000. Lineker, in that action, had two lines of argument and two lines of evidence; one, based on his assertion that D. A. McColgan had made an oral agreement under which he acquired the Crittenden certificate in trust for the Linekers, and the other that under the very terms of the deed of trust, and by virtue of the relationship between D. A. McColgan and the Linekers arising out of that deed of trust, he was precluded from acquiring the equity in the land adversely to the Linekers. An examination of the complaint in action No. 5344 contained in Exhibit "A" discloses that in Paragraph II the execution

of the first deed of trust is alleged, and the relation of trustor and beneficiary between Norvena Lineker and her husband, Frederick V. Lineker, as trustor, and Daniel A. McColgan, as beneficiary is set up, and the complaint then recites, in addition to the relation growing out of the deed of trust, the alleged oral agreement concerning the purchase of the Crittenden title.

At the end of Paragraph V of that complaint, in action No. 5344, appears the allegation:

“That in the purchase of said judgment and certificate of sale last as aforesaid, said defendant, Daniel A. McColgan, well knew that he was acting therein in accordance with his agreement to that end, and *also* that said purchase last aforesaid was made by said defendant, Daniel A. McColgan for the use and benefit of plaintiffs.”

Under those allegations Lineker, in that case, based his claim no less on the deed of trust and the relationship between the Linekers and McColgans thereby created than on the alleged oral promise. Counsel for the Linekers in that action laid much stress on the oral promise in order, if possible, to avoid the effect of such authorities as *Phelan v. Demartin*, 47 Fed. 761; *Phelan v. Demartin*, 85 Cal. 365; *Jones on Mortgages*, Vol. 1, Sec. 711; *Copsey v. Sacramento Bank*, 133 Cal. 659, and numerous others, holding that there is no fiduciary relation between the mortgagor and mortgagee, or the trustor and beneficiary, of a deed of trust *as*

such, and no reason why the lender under such instruments may not buy an outstanding title for his own benefit in the absence of fraud, deceit or other inequitable conduct; but counsel for the Linekers, as the briefs at the trial and on appeal in action No. 5344, which are in evidence here, show, insisted at all stages that by the very terms of the deed of trust and by the relationship thereby created, Daniel A. McColgan was precluded from acquiring the Crittenden title, except as trustee for Lineker.

In action No. 5344, as in the case at bar, the basic questions of law and fact were whether Lineker, by reason of his claim of ownership to the equity in the land, was entitled to any balance out of the \$14,000 derived from the sale under the first deed of trust and whether there was any consideration for the execution of the second deed of trust and the \$2455 note of September 2, 1914. In that case, as in this, the two questions are substantially identical, and fall back on the question whether, after the sale under the first deed of trust, on September 2, 1914, and after the execution of the second deed of trust on the same day, and in view of Daniel A. McColgan's purchase of the Crittenden title, Daniel A. McColgan owed Lineker, or Lineker owed Daniel A. McColgan. The issue, in other words, was not the character of the evidence, whether a written deed of trust or an oral agreement, or the theory, on which Lineker based his claim to the surplus of

the \$14,000 and his contention that there was no consideration for the second deed of trust and the \$2455 note. The issue was Lineker's right to the surplus of the \$14,000 and whether the second deed of trust and the \$2455 note were invalid for lack of consideration.

Judge Langdon in action No. 5344, after the first trial, gave a judgment in favor of McColgan. He then granted a new trial which was held. Again Judge Langdon decided in favor of McColgan, and his judgment has been affirmed on appeal. He found all the facts. He decided that McColgan bought the Crittenden title with his own money and for his own benefit, and that he owned the equity in the land at the time of the sale under the first deed of trust; and that McColgan was entitled to the entire \$14,000 derived from the sale under the first deed of trust, and that there was a valid consideration for the second deed of trust and the \$2455 note; and that there was no oral or other agreement between the McColgans and Lineker creating a trust, and that the execution of the \$2455 note on September 2, 1914 was an account stated between Lineker and McColgan as of that date.

Appellants, in their brief, at page 22, remark that the findings of fact in the action No. 5344 were very broad, and were "evidently drawn on behalf of the defendants in a very clearly apparent effort to protect them from every conceivable kind of

future attack in connection with their dealings with the property". The findings follow the pleadings and the evidence directly. Those findings, as the receipt endorsed on them shows, were submitted to counsel for the Linekers ten days or more before they were signed.

The fact that counsel for the McColgans argued in that case that the right of McColgan under the deed of trust to acquire the Crittenden title adversely to Lineker was not involved is immaterial. It did not change the issues, especially since counsel for the Linekers contended that that question was involved, action No. 5344 was tried on the theory that that question was involved, the court held that it was involved, considered the question and decided it against Lineker. The Linekers have had their day in court on that issue. Certainly, a decision the other way would have been binding on the McColgans and Cullinan.

Even when findings are outside the issues as presented by the pleadings, they are proper when the case has been tried on the theory that some vital question not in fact made an issue by the pleadings has nevertheless been made an issue by the introduction of proof addressed thereto.

Howard v. D. W. Hobson Co., 38 Cal. App. 445.

Appellants confuse the theory of their case and the character of the evidence introduced with the issue involved. The issue in action No. 5344 was

not whether Lineker's claim depended on the deed of trust or on the alleged oral contract. It might have depended on both or either. The thing decided was the claim, not the theory or the evidence on which the claim was asserted.

We have seen that Lineker in action No. 5344 did in fact plead and prove the deed of trust and reinforced it with the additional plea of a broken oral promise.

But had he rested his case in action 5344 exclusively on the oral promise, the judgment would, nevertheless, preclude Lineker's litigating here the same issue—his right to the surplus of the \$14,000 as owner of the equity in the land and the question whether there was consideration for the second deed of trust and the \$2455 note—on another theory or by other evidence.

If Lineker in that case had elected to rest his claim on oral evidence alone, that would have been his privilege. But he could not elect to present that evidence in that case, and reserve other evidence to support the same claim in later litigation in the event that he lost the first case. That, however, is what he here claims the right to do.

A litigant cannot assert a right to a fund, or seek to invalidate an instrument, on one theory or on oral evidence in a particular action, and, when defeated in that litigation, maintain a second action in another forum to establish his right to the fund, or to set aside the instrument, on some dif-

ferent ground or theory which he failed to urge, or on written or other evidence which he failed to present, in the first action.

The principle of *res adjudicata* applies to the fact determined or the principle decided, not to the theory on which the issues were litigated, or the grounds or the evidence on which the questions of fact or law were decided.

As Judge Hawley said in *Stone v. U. S.*, 64 Fed. 667:

“it is also well settled that the plea of *res adjudicata*, except in certain special cases, is not only conclusive upon the questions which the courts were required to form an opinion and pronounce judgment on, but upon every point which properly belonged to the subject of litigation, and which was, or might properly have been, brought forward in the former suit. One of the safest rules for courts to follow in determining whether a prior judgment between the same parties, concerning the same matters, is a bar, is to ascertain *whether the same evidence which is necessary to sustain the second action, if it had been given in the former suit, would have authorized a recovery therein.*”

Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co., 55 Fed. 690;
Cromwell v. Sac. Co., 95 U. S. 351-353.

Appellants, on page 37 of their brief, attack finding X (Exhibit “A”, page 87) in action No. 5344, which holds that there was an account stated between Frederick V. Lineker and Daniel A. McColgan on September 2, 1914, whereby and where-

from it appears that the sum of \$2455 was then due from Lineker to McColgan. Appellants assert that the pleadings in action No. 5344 contain no reference or suggestion relating to any account stated. But on page 20 of their brief, the appellants, reciting the allegations of the complaint in action No. 5344, stated that the complaint alleged that an accounting had been demanded of McColgan which he refused to make, and that the sum of \$14,000 received by Daniel A. McColgan from the trustee, which \$14,000 was the sum bid by Marshall and paid to Reginald McColgan as trustee, had not all been expended by Daniel A. McColgan in paying the amount due himself or any other lien or liens against the property, and that on the contrary there was then remaining in his hands in excess of \$2455 or more than sufficient to satisfy the promissory note secured by the second deed of trust. (Exhibit "A", page 15.) And appellants assert, on page 21 of their brief, that the answer of the McColgans and Cullinan in that case was a specific denial of all the material allegations of the complaint. Indeed, in paragraph IX of their answer in action No. 5344 the McColgans and Cullinan not only denied Lineker's allegation that an accounting had been refused but pleaded specifically that such an accounting had been rendered.

In other words, the question whether or not there had been an accounting of the \$14,000 between the McColgans and the Linekers was directly presented

by the pleadings in action No. 5344 and the court found that at the time the note for \$2455 and the second deed of trust were executed, said note “was intended by said Frederick V. Lineker and by said Daniel A. McColgan to be, and was in fact, an account stated between” them and “was intended to be, and was in fact, a final accounting * * * of all funds and financial transactions between them up to the time of said execution of said promissory note”.

That finding respecting the account stated is by itself conclusive on the question of *res adjudicata*. The case at bar, as we have seen, depends on the question whether after the sale under the first deed of trust, in view of the purchase by McColgan of the Crittenden title, McColgan owed Lineker or Lineker owed McColgan. Incidental to that is the question, whether there was a valid consideration for the second deed of trust and the \$2455 note. There is not in this case any suggestion by the Linekers that McColgan did not actually pay a valuable consideration for the note at the time. Their theory is that he had in his hands a balance belonging to Frederick V. Lineker more than sufficient to offset the \$2455 note. In other words, their contention is that the \$2455 note was paid before it was executed.

Judge Langdon decided in action No. 5344 that the execution of the \$2455 note by Marshall at Lineker’s request and as Lineker’s agent was an

account stated between Lineker and McColgan as of that date.

That finding determines every question of fact or law involved in the case at bar. It determines that there was nothing due to Lineker out of the \$14,000 on September 2, 1914, and that there was \$2455 due from Lineker to McColgan at the time of the execution of the \$2455 note and the second deed of trust on that date.

Appellants devote some pages of their brief to a discussion of the difference in California between a deed of trust and a mortgage and assert that the sheriff's sale on the Crittenden execution conveyed no title because the Linekers, having already conveyed their title in the land to the trustee in the first deed of trust, had no title left on which execution could have been levied. In what respect that discussion is material here we fail to perceive. It amounts to nothing more than a criticism of the correctness of the decision of the District Court of Appeal in action No. 5344, and a play on the phrase "equity of redemption". But we may remark that appellants suffer under a misconception of the nature of a deed of trust. The trustor does not part with all interest in the land when he executes a deed of trust, and the cases quoted by appellants do not so hold. True, when the trustees sell under a deed of trust, the title passes free of subsequent incumbrances. The same thing happens when a mortgage

is foreclosed. But until such a sale the trustor certainly retains an interest on which liens may be imposed, or which he may convey.

A casual glance at the opinion in *Weber v. McCleverty*, 149 Cal. 320, and the other authorities on the same point cited by appellants will disclose that they do not bear out appellants' thesis. They decide merely that a deed of trust is not a "lien" or "encumbrance" within the meaning of Section 1475 of the Code of Civil Procedure which provides that if there be subsisting liens or encumbrances on a homestead the claims secured thereby must be presented to and satisfied out of the debtor's estate before resort is had to the real property covered by the homestead.

The nature of a deed of trust has been described by the Supreme Court of California, in a decision subsequent to *Weber v. McCleverty*, in which the distinction is made between a trust deed, and a deed absolute in form but given really as security. See *McLeod v. Moran*, 153 Cal. 97, in which the court says:

"A trust-deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of said

discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere "lien" on the property, it is practically and substantially only a mortgage with power of sale. (See *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383 (53 Pac. 813); *Tyler v. Currier*, 147 Cal. 31, 36 (81 Pac. 319); *Weber v. McCleverty*, 149 Cal. 316, 320 (86 Pac. 706).) The legal title is conveyed solely for the purpose of security, leaving in the *trustor* or his *successors* a *legal* estate in the property, as against all persons except the trustees and those lawfully claiming under them. (Civ. Code, secs. 865, 866.) *Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title.* (*King v. Gotz*, 70 Cal. 226 (11 Pac. 656).) The *legal estate* thus left in the *trustor or his successors* entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead. It was expressly held in *King v. Gotz*, 70 Cal. 236 (11 Pac. 656), that the trustor may select as a homestead property covered by such a trust-deed. The estate of the trustees absolutely ceases upon the payment of the debt (Civ. Code, sec. 871), leaving the whole title in the grantor in whom it was vested at the execution of the trust-deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record of title clear. (*Tyler v. Currier*, 147 Cal. 31, 36 (81 Pac. 319).)"

Substantially to the same effect are

Tyler v. Currier, 147 Cal. 31;

Duncan v. Wolfer, 39 Cal. App. Dec. 737,
212 Pac. 390;

King v. Gotz, 70 Cal. 236.

That a trustor's interest in land subject to a deed of trust may be taken by execution sale has been expressly held in

Kennedy v. Nunan, 52 Cal. 326.

Sec. 865 of the Civil Code says:

“The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.”

The \$14,000 was the sale price of the land which McColgan (as successor to the Linekers) then owned subject to the first deed of trust. After satisfying the debt secured by that deed of trust, the trustees were bound to pay the balance of the \$14,000 to the owner of the land, D. A. McColgan. It has been held expressly that the surplus remaining after sale by trustees in such cases belongs to the successor of the original trustor.

Lineker v. McColgan, 54 Cal. App. 771, 775, in which the court said:

“On acquiring plaintiff's equity of redemption by the sheriff's deed, Daniel A. McColgan, for the protection of his title so acquired against the intermediate liens, caused the land to be sold under the trust deed. Having acquired the plaintiff's title by the sheriff's deed,

McColgan was entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled. The question of intermediate lien holders' rights to share in such surplus is not involved in this action."

See, also,

Williams v. Pratt, 10 Cal. App. 625.

But there is no occasion to discuss this question at length, for it was involved and either was or could have been raised in each of the two actions in the state courts where the primary question was the ownership of the surplus remaining of that \$14,000 after payment of the indebtedness secured by the deed of trust.

In view of the obvious fact that this suit is barred by the two former judgments, we submit that Judge Rudkin's decision sustaining the plea of *res adjudicata* may be affirmed.

Dated, San Francisco,

March 20, 1925.

Respectfully submitted,

CULLINAN & HICKEY,

Solicitors for Appellee, Eustace Cullinan.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

(Vol. 36 Cal. App. Dec. p. 559)

*In the District Court of Appeal
State of California*

Third Appellate District

No. 2340

Fred V. Lineker,

Plaintiff and Appellant,

vs.

Adelaide McColgan, administratrix with the
will annexed of the estate of Daniel A.
McColgan, deceased; R. McColgan, Eustace
Cullinan and R. S. Marshall, and Olive H.
Marshall (his wife),

Defendants and Respondents.

OPINION

The plaintiff appeals from the judgment herein denying his prayer for an injunction and an accounting.

While the pleadings are complicated and lengthy, covering forty-eight pages of the printed transcript, the facts essential to a correct understanding of the issues raised on appeal may be briefly stated.

The plaintiff was the owner of the land described in the complaint, subject to certain incumbrances in the following order of priority:

1. Trust deed to defendant R. McColgan, as security for payment to defendant Daniel A. McColgan of a promissory note for \$2,850 and future advances, executed by plaintiff's wife, Norvena E. S. Lineker, prior to her marriage and while she was owner of the land.

2. Attachment liens aggregating \$1,241.09.

3. Judgment lien for \$1,264.91.

4. Sheriff's certificate of sale of the land under execution for \$1,361.20.

Under the foregoing circumstances, Daniel A. McColgan purchased the sheriff's certificate of sale and, at the expiration of the year allowed for redemption, received and recorded the sheriff's deed to the land. On the day that and after the sheriff's deed was received and recorded, the land was sold under the trust deed to R. S. Marshall for the sum of \$14,000. Marshall made the purchase for the use and benefit of the plaintiff pursuant to an agreement between them. In order to make up the purchase price of the land and provide additional money for the plaintiff, Marshall, under agreement with the plaintiff, gave his promissory note to Daniel A. McColgan for the sum of \$2,455 and, as security for the payment thereof, conveyed the land to R. McColgan and Eustace Cullinan by trust deed.

The complaint alleges that prior to the sale under the trust deed the plaintiff demanded of Daniel A. McColgan an account of the moneys due thereunder, but that the latter refused to give it; that the certificate of sale was purchased and the sale under the trust deed was had pursuant to an agreement between plaintiff and said McColgan to the effect that out of the proceeds of the sale McColgan was to retain whatever was due him under the trust deed and for the purchase of the certificate of sale and also the amount necessary to satisfy the attachment and judgment liens, if such liens were finally adjudged to be valid, and to account to the plaintiff for the remainder thereof; *that the plaintiff has repeatedly demanded an accounting but that his demands have been refused*; that the whole of the \$14,000 was paid to Daniel A. McColgan; that it has not all been consumed “in paying the amount due under the deed of trust * * * or any liens alleged to be subsisting against said real property, but that a large amount of said sum of \$14,000 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid”, and that there is justly due plaintiff from said McColgan more than \$2,455, the sum for which the second deed of trust was given.

The plaintiff further alleges that the trustees named in the second deed of trust threaten to sell the land thereunder and prays for an injunction to prevent the sale and for an accounting.

The answer denied the alleged agreement between plaintiff and Daniel A. McColgan relative to the purchase of the certificate of sale and the disposition of the proceeds of the sale under the trust deed. At the trial the latter testified that no such agreement was made and that he acquired the land under the sheriff's certificate of purchase and deed for his own use and benefit and that he never agreed to account to plaintiff for the proceeds of the sale. The court found in accordance with such answer and testimony. The court further found that, at the time the note for \$2,455 and the second trust deed were executed, such note "was intended by said Fred. V. Lineker and by said Daniel A. McColgan to be and was in fact an account stated between" them and "was intended to be and was in fact a final accounting * * * of all debts and financial transactions between them up to the time of said execution of said promissory note." Since there is evidence to support the findings they are conclusive on appeal.

The trust deed authorized the trustee and Daniel A. McColgan to pay "all or any incumbrance now subsisting, or that may hereafter subsist thereon which may, in their judgment, affect said premises, or these trusts * * * and these trusts shall be and continue as security to the party of the third part * * * for the repayment * * * of all amounts so paid out * * * which disbursement and interest the party of the first part hereby agrees to pay."

The trust deed further provided that, in the event of a sale of the land thereunder, all sums due the third party under its terms should first be paid out of the proceeds and the surplus, if any, should be paid to the first party, or assigns.

Appellant contends that under the foregoing provisions of the trust deed "Daniel A. McColgan could not go out and purchase for his own use and benefit the * * * certificate of sale for the reason that this certificate of sale evidenced a lien subsisting upon the real property affected by said deed of trust * * * being one of the class of liens mentioned in said deed of trust." No authority is cited in support of the contention. Since the lien created by the levy of the execution under which the certificate of sale was issued was junior to that of the trust deed, the provisions of the latter instrument did not authorize the beneficiary thereunder to discharge the former incumbrance and add the amount paid therefor to the indebtedness secured by the trust deed. "A voluntary payment by a mortgagee of claims against the mortgaged property, which it was not necessary for his own protection that he should pay, does not entitle him to be subrogated to the rights of the creditors whose liens he has discharged." (Jones on Mortgages, 7th ed., sec. 878.) "Subrogation is only allowed as a matter of right in such cases, when a party is forced, for the protection of his own interests, to discharge an incumbrance which might otherwise jeopardize

them.” (*Carpentier v. Brenham*, 40 Cal. 239.) The trustee and the beneficiary were authorized to pay only such liens “as affect said premises, or these trusts.” This language must be interpreted to mean such liens as might affect the rights of the holder of the superior lien. While they were made the judges as to what incumbrances would affect such rights, they were not authorized to decide arbitrarily in disregard of the plain fact that the junior lien could in no manner affect their security.

The relation between a mortgagee and mortgagor is not fiduciary. (*De Martin v. Phelan*, 115 Cal. 538.) Neither is that between the beneficiary under a trust deed and the maker thereof. (*Copsey v. Sacramento Bank*, 133 Cal. 659.) “The acquisition of the equity of redemption by the mortgagee is looked upon with suspicion by the courts, * * * because he has, by reason of his position as creditor, a certain advantage over the mortgagor which may be abused. * * * This objection, however, does not apply with equal force when he purchases the equity of redemption from one who has purchased it of the mortgagor, or when he purchases it at an execution sale had at the instance of a stranger.” (Jones on Mortgages, 7th ed., sec. 870.) “A mortgagee in possession does not stand in such a relation of trust or confidence to the mortgagor as that he is prohibited from purchasing, for his own benefit, the title of the latter on an execution sale against him upon a judgment in favor of a third person; and he may set up a title so acquired as a

defense to an action by the mortgagor or his grantee to redeem.” (*Ten Eyck v. Craig*, 62 N. Y. 406; *Clark v. Jackson*, [N. H.] 11 Atl. 59.) “The mortgagee in possession may even purchase the equity of redemption at a sale upon an execution in his own favor issued upon a judgment for a debt other than the mortgage debt; and may hold the title adversely to the mortgagor if he does not redeem, as upon a sale upon execution.” (Jones on Mortgages, 7th ed., sec. 712; *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623.)

On acquiring plaintiff’s equity of redemption by the sheriff’s deed, Daniel A. McColgan, for the protection of his title so acquired against the intermediate liens, caused the land to be sold under the trust deed. Having acquired the plaintiff’s title by the sheriff’s deed, McColgan was entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled. The question of intermediate lienholders’ rights to share in such surplus is not involved in this action.

The judgment is affirmed.

FINCH, P. J.

We concur:

PREWETT, J. *pro tem.*

BURNETT, J.

Filed October 31, 1921,

John T. Stafford, Clerk.



No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER and FREDERICK V,
LINEKER, as administrator of the Estate of
Norvena Lineker, deceased,

Appellants,

VS.

R. S. MARSHALL, OLIVE H. MARSHALL, MARY
J. DILLON (formerly Mary J. Tynan),
ADELAIDE MCCOLGAN, as administratrix
with the will annexed of the estate of Daniel
A. McColgan, deceased (substituted in place
and stead of said Daniel A. McColgan),
EUSTACE CULLINAN, E. C. PECK, T. K.
BEARD, GRACE A. BEARD, UNION SAVINGS
BANK OF MODESTO and STANISLAUS LAND
AND ABSTRACT COMPANY,

Appellees.

BRIEF ON BEHALF OF APPELLEES,

ADELAIDE MCCOLGAN, AS ADMINISTRATRIX, ETC.,

AND R. MCCOLGAN.

FILED

MAR 24 1925

ALFRED J. HARWOOD, WONGKTON,

Kohl Building, San Francisco, CLERK

*Attorney for Appellees Ade-
laide McColgan, administra-
trix, etc., and R. McColgan.*

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BANK OF MODESTO and STANISLAUS LAND
AND ABSTRACT COMPANY,

Appellees.

**BRIEF ON BEHALF OF APPELLEES,
ADELAIDE McCOLGAN, AS ADMINISTRATRIX, ETC.,
AND R. McCOLGAN.**

The statement of the case made in the brief of appellants contains many gross errors. It also

omits material facts. These errors and omissions will be specifically referred to hereafter.

1. THE JUDGMENT IN THE ACTION OF LINEKER V. McCOLGAN (NO. 5344) IS A PRIOR ADJUDICATION OF THE CAUSE OF ACTION IN THIS SUIT.

The case at bar is for the same cause of action as the case of *Fred V. Lineker v. Daniel A. McColgan, R. McColgan, Eustace Cullinan, R. S. Marshall and Olive H. Marshall, his wife* (No. 5344), in which Judge Langdon rendered the judgment which was received in evidence. This is apparent from a comparison of the complaint in that case with the complaint in the case at bar.

On this appeal the exhibits are not printed in the transcript of the record but the original exhibits were transmitted to this court. The judgment roll in *Lineker v. McColgan* (No. 5344) is Defendants' Exhibit "A". The judgment roll in the action of *Lineker v. McColgan* (No. 5344) is also printed as an exhibit to the answer of the defendants Daniel A. McColgan, R. McColgan and Eustace Cullinan, and appears at pages 77 to 139 of the transcript of the record on the former appeal taken in the case, viz., the transcript of the record in No. 3964. In this brief, therefore, we shall refer both to Exhibit "A" and to the printed copy of the judgment roll contained in the transcript in No. 3964.

In the transactions involved in this litigation there were two separate deeds of trust. The first deed of trust was dated June 20, 1910, and will be referred to in this brief as the first deed of trust. The sale under this deed of trust was made on September 2, 1914. The second deed of trust was made on September 2, 1914, the same day that the sale under the first deed of trust was made. This last mentioned deed of trust will be referred to herein as the second deed of trust.

The gist of the complaint in the case at bar is that Daniel A. McColgan received, as the proceeds of the sale under the first deed of trust held on September 2, 1914, a sum in excess of the amount due him from plaintiffs, and that he be compelled to account for this excess, and that the second deed of trust made on September 2, 1914, was without consideration.

The following are all of the allegations of the complaint *in the case at bar* relating to the defendants Daniel A. McColgan and R. McColgan:

1. (Paragraph VII, Tr. in No. 3964, p. 4.) That the deed of trust of June 20, 1910, was made for benefit of Daniel A. McColgan and that in fact McColgan only loaned \$2500 instead of \$2850 mentioned in the note.

2. (Paragraph IX, Tr. in No. 3964, p. 5.) That the defendants R. McColgan and D. A. McColgan claimed that D. A. McColgan was entitled to \$10,000 and upwards, under said

deed of trust "which claim was false and untrue to their knowledge".

3. (Paragraph IX, Tr. in No. 3964, p. 6.) That said defendants stated to F. V. Lineker that if he did not procure and turn over to them before September 2, 1914, the sum of \$10,000, they would sell out the Linekers' interest and cause them to lose all their interest in said property.

4. (Paragraph IX, Tr. in No. 3964, p. 6.) That in order to prevent a sale of their interest in said property, plaintiffs procured Annie Connors to advance upon the security of said property \$13,000 "and relying upon such promise the plaintiff F. V. Lineker was prepared to purchase said property at said sale and to bid at said sale such amount as might be necessary to protect the property from purchase by any one else".

5. (Paragraph X, Tr. in No. 3964, p. 6.) That shortly prior to the said sale, the defendants McColgans advised F. V. Lineker that he ought to bid \$14,000 at the sale, and that it would make little or no difference in the final settlement of the accounts between plaintiffs and the said Daniel A. McColgan and R. McColgan, how much the plaintiffs bid for the property, for the reason that plaintiffs would only have to pay * * * what was justly due under said deed of trust and that all sums in excess of such amount for which the property might be sold would be accounted for to plaintiffs by

said defendants McColgans, and turned over to the plaintiffs by said defendant R. McColgan.

6. (Paragraph XI, Tr. in No. 3964, p. 7.) That the said plaintiffs "being inexperienced in business matters and particularly in matters relating to the transfer, sale or encumbrance of real property, and relying upon the advice and counsel of the defendants Daniel A. McColgan and R. McColgan, consented that the property be bought by said R. S. Marshall, as trustee for the plaintiff Frederick V. Lineker" and that "on the 2d day of August (September), 1914, the said real property was sold by R. McColgan, as trustee under said deed of trust, to the defendant R. S. Marshall, as agent and trustee for the plaintiff, Frederick V. Lineker, for the sum of fourteen thousand dollars (\$14,000)."

7. (Paragraph XVI, Tr. in No. 3964, p. 12.) That the second deed of trust made on September 2, 1914, by Marshall and wife to R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, was without consideration and that the sale thereunder to the defendant E. C. Peck was void.

8. (Paragraph XIX, Tr. in No. 3964, p. 13.) That on the 2d day of September, 1914, the said Daniel A. McColgan received from said Annie Connors the sum of \$13,000, which sum was greatly in excess of all moneys due or owing to him from the plaintiffs, or either of them.

9. (Paragraph XX, Tr. in No. 3964, p. 14.) That said Daniel A. McColgan and said R. McColgan have never paid over to the said plaintiffs, nor to either of them, any part of the said \$13,000 so advanced by said Annie Connors and received by said defendants Daniel A. McColgan and R. McColgan, and have never accounted to the said plaintiffs, or either of them, for the said money or any part thereof.

It will be seen, therefore, that as to the defendants Daniel A. McColgan and R. McColgan, the plaintiffs assert two claims, viz.:

1. That Daniel A. McColgan received as the proceeds of the sale held on September 2, 1914, more than he was entitled to receive and that he should account to plaintiff for the alleged surplus.

2. That the second deed of trust was without consideration.

The prayer of the complaint is:

- (a) That the deed of trust to secure \$2455 and the sale thereunder be declared null and void.

- (b) That D. A. McColgan and R. McColgan account to plaintiffs for the proceeds of the sale under the first deed of trust held on September 2, 1914.

An inspection of the complaint in action No. 5344 (*Lineker v. McColgan*), commenced in the Superior

Court of Stanislaus County, shows that that action was for the same cause or causes of action which are the foundation of the plaintiffs' claim in the case at bar.

The complaint in action No. 5344 (*Lineker v. McColgan*) is printed in Defendants' Exhibit "A" and also at pages 77 et seq. of the transcript in No. 3964. With reference to the sale under the first deed of trust held on September 2, 1914, the complaint in *Lineker v. McColgan* (Action No. 5344) contains the following allegation, viz.:

"That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.

"That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of \$10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said Norvena E.

S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

“That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of \$10,000 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last named defendant from said trustee, in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay, or cause to be paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale.” (Paragraph III of Complaint in *Lineker v. McColgan*, Tr. in No. 3964, p. 80.) (Defendants’ Exhibit “A”, p. 4.)

With reference to the plaintiff’s demand for an accounting, the complaint in *Lineker v. McColgan* (No. 5344) contained the following allegations:

“Plaintiff has repeatedly requested and demanded of said defendant, Daniel A. McColgan, that he render an account of the said sum of \$14,000.00, and that he pay plaintiff such a sum as, upon such accounting, might appear to be justly due him. but said defendant, Daniel A. McColgan, wholly refuses and declines, and does still refuse and decline, to render any account of said sum which is justly due or owing to him, in accordance with the agreement to that end had by and between plaintiff and defendant,

Daniel A. McColgan.” (Defendants’ Exhibit “A”, p. 16; Tr. in No. 3964, p. 90.)

With reference to the deed of trust to secure \$2455, executed on September 2, 1914 (the second deed of trust), and also with reference to the demand for an accounting, the complaint in *Lineker v. McColgan* (No. 5344) contains the following allegations, viz.:

“That plaintiff is informed and believes, and therefore alleges, that the whole of said sum of \$14,000.00 was not in fact paid, laid out or expended by said defendant, Daniel A. McColgan, in paying the amount due under the Deed of Trust first hereinbefore mentioned, or any liens alleged to be subsisting against said real property, but that a large amount of said sum of \$14,000.00 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid, and that the amount so retained by said defendant, Daniel A. McColgan, can only be ascertained upon an accounting had of said defendant, Daniel A. McColgan.

“That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant, Daniel A. McColgan, as aforesaid, after deducting those charges which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of \$2,455.00.” (Paragraph VIII of Complaint in *Lineker v. McColgan*, No. 5344; Defendants’ Exhibit “A”, p. 16, Tr. in No. 3964, p. 90.)

The prayer of the complaint in *Lineker v. McColgan* (No. 5344) is:

(a) That a sale under the deed of trust dated September 2, 1914, be enjoined.

(b) That the defendant Daniel A. McColgan account to plaintiff for the proceeds of sale held on September 2, 1914.

The findings and judgment of the court in *Lineker v. McColgan* (No. 5344) were against the plaintiff and in favor of the defendants Daniel A. McColgan and R. McColgan on all the issues in the case. By that judgment it was adjudicated that the plaintiff was not entitled to an accounting of the proceeds of the sale held on September 2, 1914, and that the second deed of trust was given for a valuable consideration and was valid and binding upon the plaintiff.

In *Lineker v. McColgan* (No. 5344) the complaint also alleged the purchase by Daniel A. McColgan of a sheriff's certificate of sale made to one Crittendon and it was alleged that this purchase was made by Daniel A. McColgan under an alleged agreement that the purchase should be for the benefit of the plaintiff.

It was further contended in the trial court that under the terms of the deed of trust of June 20, 1910, Daniel A. McColgan could not purchase this certificate of sale for his own benefit.

The trial court found against both of these contentions and its findings and judgment were affirmed on appeal.

The complaint in the case at bar does not refer specifically to the purchase by Daniel A. McColgan of the Crittendon certificate of sale, but it is alleged that Daniel A. McColgan received and retained all of the proceeds of the sale held on September 2, 1914 (Complaint, Paragraphs XIX and XX, Tr. in No. 3964, pp. 13-14), and in the first special defense (Answer of these Defendants, p. 42, Tr. in No. 3964) the purchase of the Crittendon certificate of sale by D. A. McColgan is alleged.

The purchase of the Crittendon certificate of sale, by Daniel A. McColgan, and the subsequent execution of the sheriff's deed to him, are merely evidence that the plaintiffs were not entitled to an accounting of the proceeds of the sale held on September 2, 1914.

In *Lineker v. McColgan* (No. 5344) Fred V. Lineker as the successor in interest of Norvena Lineker, asserted that he was the owner of the equity in the property on September 2, 1914, the date it was sold for \$14,000 under the deed of trust. (Defendants' Exhibit "A", p. 17; Tr. in No. 3964, p. 91.) And he further alleged that Daniel A. McColgan owed him, as the surplus proceeds of the sale, considerably more than the sum of \$2455. (*Idem.*)

So that with reference to the first deed of trust the issues in *Lineker v. McColgan* (No. 5344) were these:

1. Was Fred V. Lineker the owner of the property, or the equity therein, at the time of the sale made on September 2, 1914?

2. Was Fred V. Lineker, the plaintiff, entitled to any part of the \$14,000 received by Daniel A. McColgan as the proceeds of the sale made on September 2, 1914?

The complaint in *Lineker v. McColgan* (No. 5344) alleges that Norvena Lineker conveyed her interest in the property subject to the deed of trust to Fred V. Lineker, the plaintiff. (Paragraphs I and II of Complaint; Defendants' Exhibit "A", pp. 1-3; Tr. in No. 3964, p. 79.)

The complaint in *Lineker v. McColgan* (No. 5344) alleges:

"Plaintiff alleges that the value of his equity in said real property is of far greater value than the amount alleged to be due to defendant Daniel A. McColgan, under and in accordance with the terms of said promissory note for \$2455." (Defendants' Exhibit "A", p. 17; Tr. in No. 3964, p. 91.)

The answer of the defendants in *Lineker v. McColgan* (Paragraph X, Tr. in No. 3964, p. 108) contains the following denial:

"Deny that said plaintiff has, or at any time since the 15th day of July, 1914, had any equity or interest or right, or title or estate whatsoever in or to said real property or any part thereof."

The trial court made the following finding of fact (Paragraph XIII of Findings; Defendants' Exhibit "A", p. 91; Tr. in No. 3964, p. 134):

"That on said 2nd day of September, 1914, at the time of said sale, the said Daniel A. McColgan was the owner of said real property."

Paragraph VIII of the complaint in *Lineker v. McColgan* (No. 5344) contains the following allegation:

“That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant, Daniel A. McColgan, as aforesaid, after deducting those charges which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of \$2,455”. (Defendants’ Exhibit “A”, p. 17; Tr. in No. 3964, p. 91.)

This allegation is denied in Paragraph IX of the answer of the defendants. (Defendants’ Exhibit “A”, p. 34; Tr. in No. 3964, p. 107.)

It will be seen, therefore, that under the issues in *Lineker v. McColgan* (No. 5344) the plaintiff could introduce any evidence which would tend to show that he was the owner of the equity at the time of the sale and that he was entitled to any part of the \$14,000 for which the property was sold.

Under these issues the plaintiff introduced in evidence the trust deed dated June 20, 1910, and contended that the purchase of the certificate of sale by Daniel A. McColgan on July 15, 1914, was made in pursuance of the terms of the deed of trust and that the purchase of the certificate of sale did not constitute Daniel A. McColgan the owner of the property. If the deed of trust bore such construction the plaintiff would have prevailed on the issue of ownership on September 2, 1914.

So with reference to the issue as to whether any money was due plaintiff from Daniel A. McColgan as the surplus proceeds of the sale made on September 2, 1914, it was competent for the plaintiff to show any fact which would support the plaintiff's side of this issue. The deed of trust was proper evidence, and if it was subject to the construction contended for by plaintiff, it would have entitled plaintiff to a finding in his favor on that issue.

But these issues were determined in favor of the defendants, and the court found that Daniel A. McColgan was the owner of the property on September 2, 1914, and that the plaintiff was not entitled to any part of the proceeds of the sale.

Both in the trial court and in the District Court of Appeal, the plaintiff Fred V. Lineker contended that the deeds of trust entitled him to a finding that he was the owner of the property on September 2, 1914.

At the trial Mr. Dennett, the plaintiff's attorney, testified as follows, as a witness for the plaintiff:

"I may have been incorrect in my assumption of the law, but I assumed whatever the trustee took would be taken in the benefit of the beneficiary, that is one reason I didn't worry about it. When we took up any of those claims, I assumed as a matter of law that he of necessity took them for the benefit of the beneficiary under the deed of trust." (Printed copy Bill of Exceptions in *Lineker v. McColgan* (No. 5344); p. 143 Defendants' Exhibit "E", erroneously marked Plaintiff's Exhibit "E".)

The following are quotations from Appellant's Opening Points and Authorities in the higher courts (Defendants' Exhibit "D"):

"Respondent D. A. McColgan was bound by the terms of the deed of trust under date of June 20, 1910, as to his purchase of the Crittenden certificate of sale and disposition of the surplus from the trustee's sale." (P. 5.)

"The appellant contends that the evidence adduced at the trial is insufficient to justify the findings of the trial court, and particularly in the first place that finding which stated that the respondent, Daniel A. McColgan, had purchased and acquired from William C. Crittenden all the right, title and interest of said William C. Crittenden in and to said real property, and in and to said certificate of sale for his own use and benefit, and with his own money. (Trans. folio 230.) Appellant claims that according to the terms of the deed of trust under date of June 20, 1910, that Daniel A. McColgan could not go out and purchase for his own use and benefit the Crittenden certificate of sale for the reason that this certificate of sale evidenced a lien subsisting upon the real property affected by said deed of trust and as such was a lien subsisting against said real property at a date subsequent to the execution of the deed of trust but still being one of the class of liens mentioned in said deed of trust. (Trans. folio 559.)

The deed of trust in question is set forth fully as Appellant's Exhibit 2-A (Trans. folio 551 et seq.)." (P. 5.)

"The deed of trust under date of June 20, 1910 (Trans. folio 551 et seq.), was not executed simply to secure the payment of the original note nor to secure any note as such, but secured the debt, the note being merely evidence of the debt. All of the disbursements made by

Daniel A. McColgan as the third party to the deed of trust are expressly authorized to be made by him and to become part of the debt due him and are therefore fully covered by the provisions of the deed of trust.” (P. 8.)

“This is so obvious from the terms of the deed of trust, that it would seem that no argument was necessary to prove the same, but when this same point was argued before the trial court its only comment was that ‘it would be a very forced construction of the terms of the deed of trust in question.’ ” (P. 8.)

“The conclusion of law made by the trial court that respondent, Daniel A. McColgan, was, on the date of sale held under the terms of the deed of trust here in question the owner of the real property affected by said deed of trust (Trans. folio 185) is based upon its finding that Daniel A. McColgan purchased the Crittenden certificate of sale for his own use and benefit. Appellant contends that by the very terms of the deed of trust itself, respondent, Daniel A. McColgan, could not have purchased the Crittenden certificate of sale for his own use and benefit so that the conclusion of law made by the trial court that on the date of the sale said McColgan was the owner of the property in question, must likewise fall.” (P. 9.)

Counsel for appellant in their appeal in *Lineker v. McColgan* (No. 5344) referred to the finding of ownership by McColgan as a conclusion of law. As we have seen, it is a finding of fact and appears in the findings (Paragraph XIII of Findings; Defendants’ Exhibit “A”, p. 91; Tr. in No. 3964, p. 134). As far, however, as the doctrine of *res judi-*

cata is concerned, it would make no difference whether it is a conclusion of fact or law.

At page 26 of appellants' brief the following statement is made:

“It is the appellant's contention that the only issue actually tried and litigated in the Superior Court in action No. 5433 was whether Daniel A. McColgan had entered into an oral agreement with the plaintiff to purchase the Crittendon certificate of sale for the benefit of Lineker himself and that none of the rights of Norvena Lineker were involved in that action.”

The complaint in *Lineker v. McColgan* (No. 5344) alleged that the plaintiff was the owner of the property which had been sold on September 2, 1914, under the first deed of trust, and sought an accounting of the alleged surplus arising from that sale. The complaint also alleged that the surplus proceeds of the sale under the first deed of trust exceeded the amount of the second deed of trust for \$2455. Both Daniel A. McColgan, and R. McColgan, the trustee under the first deed of trust, were parties defendant as was also Eustace Cullinan, who, with R. McColgan, was a trustee under the second deed of trust. In *Lineker v. McColgan* (No. 5344) there was presented to the court every question which can possibly arise in the case at bar, *both with reference to the alleged surplus arising from the first sale and to the validity of the second deed of trust for \$2455.*

In Paragraph V of the complaint in *Lineker v. McColgan* (No. 5344) (pp. 7, 8, 9, Defendants' Exhibit "A"; pp. 83-84 Tr. in No. 3964), the plaintiff alleged that Daniel A. McColgan purchased the Crittendon certificate of sale, pursuant to an agreement that he would purchase it, for the benefit of plaintiff, *but this paragraph of the complaint could have been omitted entirely and the complaint would nevertheless state a cause of action for an accounting of the surplus proceeds of the sale held on September 2, 1914.*

The purchase of the Crittendon certificate of sale by Daniel A. McColgan, and the subsequent execution of the sheriff's deed to him, were merely evidence that the plaintiffs were not entitled to an accounting of the proceeds of the sale held on September 2, 1914.

In *Lineker v. McColgan* (No. 5344) Fred V. Lineker, as the successor in interest of Norvena Lineker, asserted that he was the owner of the equity in the property on September 2, 1914, the date it was sold for \$14,000 under the deed of trust. And he further alleged that Daniel A. McColgan owed him, as the surplus proceeds of the sale, considerably more than the sum of \$2455.

So as already pointed out, *supra*, the issues in Case No. 5344 with reference to the first deed of trust were these:

1. Was Fred V. Lineker the owner of the property or the equity therein at the time of the sale made on September 2, 1914?

2. Was Fred V. Lineker, the plaintiff, entitled to any part of the \$14,000 received by Daniel A. McColgan as the proceeds of the sale made on September 2, 1914?

Under the issues in *Lineker v. McColgan* (No. 5344) the plaintiff could introduce any evidence which would tend to show that he was the owner of the equity at the time of the sale and that he was entitled to any part of the \$14,000 for which the property was sold.

Under these issues the plaintiff introduced in evidence the first deed of trust, viz., trust deed dated June 20, 1910 (Bill of Exceptions in *Lineker v. McColgan*, Defendants' Exhibit "E", p. 184), and contended that the purchase of the certificate of sale by Daniel A. McColgan on July 15, 1914, was made in pursuance of the terms of the deed of trust and that said purchase did not constitute Daniel A. McColgan the owner of the property (Plaintiff's Trial Brief, Exhibit "F", p. 4). If the deed of trust bore this construction, the plaintiff would have prevailed on the issue of ownership on September 2, 1914.

Not only was the trust deed admissible in evidence under the allegations quoted above, but it was also admissible under the following allegation which occurs at the end of Paragraph V of the complaint. (Complaint in *Lineker v. McColgan*, Defendants' Exhibit "A", p. 10; Tr. in No. 3964, p. 86.)

“That in the purchase of said judgment and certificate of sale last as aforesaid said defendant, Daniel A. McColgan, well knew that he was acting therein in accordance with his agreement with plaintiff to that end, *and also that said purchase last aforesaid was made by said defendant, Daniel A. McColgan, for the use and benefit of plaintiff.*”

Under this allegation also the plaintiff was entitled to prove both the alleged oral promise and also to introduce in evidence the deed of trust and to maintain that by its terms the purchase of the Crittendon certificate enured to his benefit.

With reference to the issue as to whether any money was due plaintiff from Daniel A. McColgan as the surplus proceeds of the sale made on September 2, 1914, it was competent for the plaintiff to show any fact which would support the plaintiff's side of this issue. The deed of trust was proper evidence and if it was subject to the construction contended for by plaintiff, it would have entitled plaintiff to a finding in his favor on that issue.

But these issues were determined in favor of the defendant, and the court found that Daniel A. McColgan was the owner of the property on September 2, 1914, and that the plaintiff was not entitled to any part of the proceeds of the sale.

Paragraph III of the complaint which preceded the Paragraph V (containing the allegations regarding the purchase of the Crittendon certificate of sale) is as follows (Judgment Roll in *Lineker v.*

McColgan, Exhibit "A", p. 4; Tr. in No. 3964, p. 80) :

"That after said notice of sale had been given in the manner prescribed by said Deed of Trust, and prior to the sale of said real property as hereinbefore mentioned, plaintiff and defendant, Daniel A. McColgan, made and entered into an agreement wherein and whereby they agreed that plaintiff would purchase said real property at said sale for a sum of money sufficient in amount to pay the amount which said defendant, Daniel A. McColgan, claimed to be due to him from said Norvena E. S. Lineker, and expenses of said sale, and any other liens subsisting against said real property not secured by said Deed of Trust.

That at that time plaintiff made a formal demand upon said defendant, Daniel A. McColgan, that he render an account of the amount claimed to be due to him by said Norvena E. S. Lineker, but that said defendant, Daniel A. McColgan, refused to render any such account, though he then and there informed plaintiff that the said real property should be sold for the sum of \$10,000.00, and which sum he informed plaintiff would be sufficient to repay the amount claimed to be due to him by said Norvena E. S. Lineker, including the expenses of said sale, and also any other alleged liens subsisting against said real property, but not secured by said Deed of Trust.

That thereupon plaintiff and said defendant, Daniel A. McColgan, further agreed that plaintiff would bid the sum of \$10,000 for said real property at said sale, but upon the further understanding and agreement with said defendant, Daniel A. McColgan, that out of the proceeds of said sale coming into the hands of said last-named defendant from said trustee in the manner hereinafter alleged, he, said Daniel A. McColgan, would not pay, or cause to be

paid, any of said alleged liens, until the same had been judicially determined to be valid and subsisting liens against said real property, and upon the further understanding that said defendant, Daniel A. McColgan, would account to plaintiff for all moneys coming into his hands as the proceeds of said sale.”

Paragraph VIII of the complaint in Action No. 5344 (p. 16 of Judgment Roll, Exhibit “A”; p. 90 of Tr. in No. 3964) is as follows:

“Plaintiff has repeatedly requested and demanded of said defendant, Daniel A. McColgan, that he render an account of the said sum of \$14,000.00, and that he pay plaintiff such a sum as, upon accounting, might appear to be justly due to him, but said defendant, Daniel A. McColgan, wholly refuses and declines, and does still refuse and decline, to render any account of said sum of \$14,000.00, or to pay to plaintiff the sum which is justly due or owing to him, in accordance with the agreement to that end had by and between plaintiff and defendant, Daniel A. McColgan.

That plaintiff is informed and believes, and therefore alleges, that the whole of said sum of \$14,000.00 was not in fact paid, laid out or expended by said defendant, Daniel A. McColgan, in paying the amount due under the deed of trust first hereinbefore mentioned, or any liens alleged to be subsisting against said real property, but that a large amount of said sum of \$14,000.00 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid, and that the amount so retained by said defendant, Daniel A. McColgan, can only be ascertained upon an accounting had of said defendant, Daniel A. McColgan.

That plaintiff alleges that there is justly due, owing and unpaid to him by said defendant,

Daniel A. McColgan, as aforesaid, after deducting those charges which, upon an accounting herein, may be found to be proper items of debit, considerably more than the said sum of \$2,455.00.”

It will be seen, therefore, that under the issues in *Lineker v. McColgan* (No. 5344), the plaintiff was entitled to prove any fact showing that he was entitled to a part of the sum of \$14,000 for which the property was sold on September 2, 1914.

The first deed of trust was introduced in evidence in *Lineker v. McColgan* (No. 5344) and both in the trial court and in the appellate court the plaintiff contended that under its terms Daniel A. McColgan could not purchase the Crittendon certificate of sale and hold it adversely to plaintiff.

This contention was urged at great length before the trial court. (See plaintiff's trial briefs introduced in evidence, Defendant's Exhibits F, G and H.) And in the appellate court the same contention was made. We have already quoted at length from the appellant's brief in the District Court of Appeal on this point.

Appellants' brief before this court contains quotations from the defendants' brief in the District Court of Appeal, where it is contended that the only matter before the court was the alleged oral agreement regarding the purchase of the Crittenden certificate of sale and that the construction of the deed of trust was not before the court.

But the appellate court in its decision ignored the respondents' contention and decided on the merits the contentions made by Lineker based on the deed of trust.

Obviously the contention referred to by counsel for appellants is wholly immaterial for it was ignored by the District Court of Appeal and Lineker's contentions decided on their merits.

In the trial court, likewise, Lineker's contentions based on the deed of trust were decided on the merits. This is shown by the judgment itself and also by the following excerpt from Lineker's brief in the appellate court, Exhibit "D" (page 8):

"When this same point was argued before the trial court its only comment was 'it would be a very forced construction of the terms of the deed of trust in question'."

It will be seen, therefore, that the contention was decided on the merits by the trial court and by the appellate court, and that the statement in appellants' brief herein to the effect that the only issue "actually tried" in *Lineker v. McColgan* was as to existence of the alleged oral agreement is wholly unsupported by the record.

Even if the contention advanced by Lineker regarding the deed of trust had not been strictly within the issues raised by the pleadings, such contention was, in fact, made and determined both by the trial court and by the appellate court and it is *res judicata*.

What the plaintiffs are seeking in the case at bar is the same thing that the plaintiff Lineker sought in the action of *Lineker v. McColgan* (No. 5344) viz., the money which it is claimed was due as the surplus proceeds of the sale held on September 2, 1914. The only allegation of the complaint in the case at bar which attempts to state a cause of action for this money is contained in Paragraphs X and XIX of the complaint in the case at bar.

Paragraph X of the complaint in the case at bar contains the following allegations:

“That shortly prior to the said sale, the said defendants *Daniel A. McColgan* and *R. McColgan*, advised the plaintiff, *Frederick V. Lineker*, that he ought to bid for said property at said sale at least the sum of fourteen thousand dollars (\$14,000.00), and that it would make little or no real difference in the final settlement of the accounts between the plaintiffs and said *Daniel A. McColgan* and *R. McColgan*, how much the plaintiffs bid for said property, for the reason that the plaintiffs would only have to pay to the defendants *Daniel A. McColgan* and *R. McColgan* what was justly due under said deed of trust dated June 20th, 1910, and that all sums in excess of such amount for which the property might be sold, would be accounted for to the said plaintiffs by said defendants, *Daniel A. McColgan* and *R. McColgan*, and turned over to the plaintiffs by said defendant, *R. McColgan*.” (Tr. in No. 3964, p. 6.)

Paragraph XIX of the complaint in the case at bar contains the following allegations:

“That on the 2nd day of September, 1914, the said *Daniel A. McColgan* received from said *Annie Connors* the sum of thirteen thousand dollars (\$13,000.00), which sum was greatly in excess of all moneys due or owing to him from the plaintiffs, or either of them;” (Tr. in No. 3964, p. 13.)

The most casual comparison of the above quoted allegations from the complaint in the case at bar with the allegations of the complaint in *Lineker v. McColgan* (No. 5344) will show that the same claim is asserted in both actions.

The trial briefs which are in evidence also clearly show that at the trial of the action of *Lineker v. McColgan* (No. 5344) the plaintiff claimed that under the terms of the deed of trust the purchase of the Crittendon certificate of sale enured to Lineker's benefit. This contention was wholly independent of the contention based on the oral agreement.

At page 3 of one of the trial briefs (Defendant's Exhibit "F") the following statement is made:

Defendant, Daniel A. McColgan claims the residue of the trustee's sale by virtue of the Sheriff's deed under the Williams (Crittendon) judgment but plaintiff herein demands the same not only under the terms and provisions of the deed of trust of June 20, 1910, but in accordance with the terms of the agreement had with defendant, Daniel A. McColgan by his attorney, L. L. Dennett, in accordance with which, as plaintiff claims, said Daniel A. McColgan purchased the Crittendon Certificate of Sale for his use and benefit.

In fact this was the primary contention made by Lineker at the trial. Point "one" of the written argument in the trial brief (Defendant's Exhibit "F") is as follows:

Point One. Defendant D. A. McColgan is bound by the deed of trust under date of June 20, 1910, as to his purchase of the Crittendon certificate of sale and disposition of the surplus from the trustee's sale.

The argument based on this contention consumes the first eleven pages of the brief. Point "two" which commences at page eleven refers to the alleged oral agreement. The other trial briefs in the case also clearly show the same matter but it would be superfluous to refer to them.

At the trial of *Lineker v. McColgan* (No. 5344) the plaintiff's attorney made the following statement:

"The whole issue in this case is: Is there to be a surplus fund between the plaintiff here and the defendant here. The moneys here came into the defendant's hands from the trustee; he admits receiving the sum of \$14,000; there is excess money, which money we claim." (p. 156 of Bill of Exceptions, Defendant's Exhibit "E".)

The attorney for the plaintiff at the trial also made the following statement:

"I may have been incorrect in my assumption of the law, but I assumed whatever the trustee took would be taken in the benefit of the beneficiary, that is one reason I didn't worry about it. When we took up any of those

claims, I assumed as a matter of law that he of necessity took them for the benefit of the beneficiary under the deed of trust." (Bill of Exceptions, p. 143, Defendant's Exhibit "E".)

At page 37 of appellants' brief the following statement is made:

Certainly any reasonably close examination of the judgment roll and of the bill of exceptions in action No. 5344 will reveal that the existence or non-existence of a consideration for the deed of trust in the sum of \$2455.00 was at no time in issue.

By paragraph IV of the complaint in *Lineker v. McColgan* (No. 5344) it is alleged that deed of trust for \$2455 was made for the purpose of securing defendant Daniel A. McColgan in event he should pay any of certain liens on the real property. (Exhibit "A", p. 6, Tr. in No. 3964, p. 82.)

In paragraph VI of the complaint it is alleged that said sum of \$2455 was loaned to said defendants R. S. Marshall for the use and benefit of plaintiff and at plaintiff's special instances and request. (Defendant's Exhibit "A", p. 13, Tr. in No. 3964, p. 88.)

At paragraph VIII of the complaint in *Lineker v. McColgan* (No. 5344) it is alleged that the amount due to Lineker after an accounting of the proceeds of the sale of September 2, 1914, is considerably more than the amount of the said deed of trust for \$2455.00. (Defendant's Exhibit "A", p. 17, Tr. in No. 3964, p. 91.) In paragraph IX of the com-

plaint this allegation is repeated. (Page 17, Exhibit "A".)

Clearly there was put an issue by the complaint in this action the question as to the consideration of the deed of trust for \$2455.00 and the finding of the trial court as to what the consideration was, was clearly within the issues. The trial court found the exact consideration for the note and deed of trust for \$2455.00. This is contained in paragraph IX of the findings at page 81 of the judgment roll. (Defendant's Exhibit "A", p. 81, Tr. in No. 3964, p. 126.) The court found that the consideration for this note and deed of trust was the sum of \$2455.00 loaned by Daniel A. McColgan to R. S. Marshall as the agent and trustee for Lineker. This finding was clearly within the issues and adjudicated any question as to the consideration for and validity of the note and deed of trust for \$2455.00.

In the judgment roll two sets of findings appear. One set of findings was made at the first trial and the other set was made at the second trial of the case. Possibly counsel have omitted to read the findings made after the second trial.

At page 26 and at other places in appellant's brief the statement is made that at the trial of the action of *Lineker v. McColgan* (No. 5344) the attorney for Lineker "abandoned" certain matters. This assertion is based upon the following statement made by Lineker's attorney at the trial:

“We might state here, if your Honor please, in view of the turn this case has now taken, that these questions as to the purchase of this property by the Marshalls, and matters relative to the second deed of trust, \$2455.00 deed of trust, might be immaterial to—irrelevant to our present action, but there is nothing in there about it being part of the agreement, but, however, it is rather immaterial, I think. The crux of the matter is getting back to the agreement had between Daniel A. McColgan and the plaintiff as to the sale.” (Defendant’s Exhibit “E”, p. 101.)

Obviously Lineker’s attorney by the foregoing statement *abandoned nothing*. The trial briefs and the briefs in the appellate court clearly show that the plaintiff at all times insisted that under the terms of the deed of trust the purchase of the Crittendon certificate of sale enured to Lineker’s benefit.

At page 38 of appellants’ brief the statement is made that counsel at the trial of *Lineker v. McColgan* (No. 5344) “specifically and clearly withdrew and abandoned all matters in complaint concerning the rights of any of the parties with reference to or pertaining to said deed of trust for \$2455.00 thereby eliminating them from the case. This statement in appellant’s brief is based upon the statement made by the attorney for Lineker at the trial appearing at page 26 of appellants’ brief and quoted above. The statement made in appellants’ brief is obviously erroneous.

At page 35 of appellants' brief the following statement is made:

“Furthermore, even if it be conceded, for the sake of argument, that the right of Daniel A. McColgan to purchase the Crittendon certificate in hostility to Frederick V. Lineker has passed into the realm of adjudicated issues, it still remains the fact that McColgan's right to purchase that certificate in hostility to Norvena Lineker has never been passed upon.”

This same contention was made in the trial court before Judge Rudkin. Obviously it is unsound. The action of *Lineker v. McColgan* (No. 5344) was prosecuted by Lineker as the alleged owner of the real property and as the successor in interest of his wife, Norvena Lineker. Since that action was commenced he has re-conveyed the property to his wife. She is bound by the judgment in the same way as she would be bound had she been the plaintiff herself.

In the action of *Lineker v. McColgan* (No. 5344) Fred V. Lineker, as the grantee of Norvena Lineker, his wife, was entitled to the surplus proceeds of the sale.

Buttrick v. Wentworth, 6. Allen 79 (Mass.);

Johnson v. Wilson, 77 Mo. 639;

Reid v. Mullins, 91 S. W. 523 (Mo.).

Counsel for appellants say that it is admitted to be a fact that counsel for both sides “in the District Court of Appeal” discussed at considerable length the proposition that under the terms of the deed

of trust Daniel A. McColgan was prohibited from purchasing the Crittendon certificate of sale in hostility to Lineker. Counsel for appellants then say "the only question of fact actually litigated was concerning the existence of the oral agreement".

As already pointed out this matter was the primary point discussed both in the trial court and in the District Court of Appeal.

In determining whether or not there has been a prior adjudication of a cause of action questions of law are just as important as questions of fact. This question of law was urged by Lineker's attorney both in the trial court and in the District Court of Appeal.

If the plaintiff had prevailed in *Lineker v. McColgan* (No. 5344) the judgment would have been that McColgan pay him the surplus proceeds of the sale. In the case at bar if the plaintiff prevailed the judgment would be for the same surplus. This shows the absolute identity of the causes of action. If appellants' contentions here made were sound the plaintiff could recover two judgments.

Mr. *Chand* says at page 52-A:

"Could the former suit and the present suit proceed *pari passu* to judgment? If not then the judgment in one is a bar to the other."

Let us suppose that the court in *Lineker v. McColgan* (No. 5344) had found against Lineker on the issue as to the alleged oral agreement to purchase the certificate of sale for Lineker's benefit,

but had, nevertheless, held that Lineker was entitled to the surplus, based upon the construction of the deed of trust contended for by Lineker, and that this judgment had been affirmed on appeal. Could it possibly be maintained that such judgment would not be *res judicata* in favor of Lineker?

2. **BY VIRTUE OF THE CRITTENDON CERTIFICATE OF SALE AND THE SHERIFF'S DEED MADE IN PURSUANCE THEREOF DANIEL A. McCOLGAN WAS ENTITLED TO THE SURPLUS PROCEEDS OF THE SALE MADE UNDER THE DEED OF TRUST. THE CASE OF WEBER v. McCLEVERTY, 149 CAL. 316, HOLDS NOTHING TO THE CONTRARY.**

Counsel for appellants have made a very fanciful argument based on the case of *Weber v. McCleverty*, 149 Cal. 316. After citing this case and after stating that Daniel A. McColgan "did not acquire an equity of redemption in these lands by reason of his purchase of the Crittendon certificate of sale" counsel ask how the lower court could be correct in making the following statement in its opinion, viz.:

"First, that under the execution sale and sheriff's deed, McColgan acquired the equity of redemption in the lands in controversy, in his own right, and became entitled to receive and retain for his own use and benefit all proceeds of the sale under the trust deed above

the indebtedness secured thereby, to which the plaintiff would otherwise have been entitled.” (Tr. p. 30.)

Both Judge Rudkin and the judges of the District Court of Appeal in *Lineker v. McColgen* (No. 5344) employed the term “equity of redemption” in its popular rather than its technical sense. There is, of course, no redemption from a sale under a deed of trust but the trustor and his successors in interest have at least an “equity” in the property.

The most cursory examination of the case of *Weber v. McCleverty*, 149 Cal. 320, supra, and the other cases cited by appellants will disclose that they offer no support to appellants’ contention.

They decide merely that a deed of trust is not a “lien” or “encumbrance” within the meaning of section 1475 of the Code of Civil Procedure which provides that if there be subsisting liens or encumbrances on a homestead the claims secured thereby must be presented to and satisfied out of the debtor’s estate before resort is had to the real property covered by the homestead.

The nature of a deed of trust has been described by the Supreme Court of California, in a decision subsequent to *Weber v. McCleverty*, in which the distinction is made between a trust deed, and a deed absolute in form but given really as security. See *McLeod v. Moran*, 153 Cal. 97, in which the court says:

“A trust-deed of the kind here involved differs from such a deed only in that it conveys

the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. (See *Sacramento Bank v. Alcorn*, 121 Cal. 379, 383 (53 Pac. 813); *Tyler v. Currier*, 147 Cal. 31, 36 (81 Pac. 319); *Weber v. McCleverty*, 149 Cal. 316, 320 (86 Pac. 706).) The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. (Civ. Code, secs. 865, 866.) Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. (*King v. Gotz*, 70 Cal. 236 (11 Pac. 656).) The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always, of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead. It was expressly held in *King v. Gotz*, 70 Cal. 236 (11 Pac. 656), that the trustor may select as a homestead property covered by such a trust-deed. The estate of the trustees absolutely ceases upon the payment of the debt (Civ. Code, sec. 871), leaving the whole title in the grantor

in whom it was vested at the execution of the trust-deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record title clear. *Tyler v. Currier*, 147 Cal. 31, 36 (81 Pac. 319).”

Substantially to the same effect are:

Tyler v. Currier, 147 Cal. 31;

Duncan v. Wolfer, 39 Cal. App Dec. 636,
212 Pac. 390;

King v. Gotz, 70 Cal. 236.

That a trustor's interest in land subject to a deed of trust may be taken by execution sale has been expressly held in

Kennedy v. Nunan, 52 Cal. 326.

Sec. 865 of the Civil Code says:

“The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.”

The \$14,000 was the sale price of the land which McColgan (as successor to the Linekers) then owned subject to the first deed of trust. After satisfying the debt secured by that deed of trust, the trustees were bound to pay the balance of the \$14,000 to the owner of the land, Daniel A. McColgan. It has been held expressly that the surplus remaining after sale by trustees in such cases belongs to the successor of the original trustor.

In *Lineker v. McColgan*, 54 Cal. App. 771-775, the court said:

“On acquiring plaintiff’s equity of redemption by the sheriff’s deed, Daniel A. McColgan, for the protection of his title so acquired against the intermediate liens, caused the land to be sold under the trust deed. Having acquired the plaintiff’s title by the sheriff’s deed, McColgan was entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled. The question of intermediate lien holders’ rights to share in such surplus is not involved in this action.”

See also,

Williams v. Pratt, 10 Cal. App. 625.

But even if there was anything of merit in appellant’s contention it would be wholly immaterial here as that matter was forever set at rest, as far as this litigation is concerned by the judgment in *Lineker v. McColgan* (No. 5344).

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3. THE JUDGMENT IN THE ACTION OF MARSHALL v McCOLGAN (No. 5353) IS LIKEWISE A PRIOR ADJUDICATION OF THE CAUSE OF ACTION IN THIS SUIT.

Equally with the judgment in *Lineker v. McColgan* (No. 5344) the judgment in *Marshall v.*

McColgan (No. 5353) is a complete adjudication of the cause of action herein sued upon. I am informed by Mr. Cullinan that in his brief herein he will discuss this point in full. Therefore, in order to save repetition, I will make but the briefest reference to the matter here.

The complaint in the case at bar shows that R. S. Marshall was the agent and trustee for the Linekers. They are therefore privies to any judgment rendered for or against him.

The insinuation that the judgment in *Marshall v. McColgan* was collusive is not only wholly irrelevant but is absolutely without foundation in fact.

4. **THE JUDGMENT IN LINEKER v. MCCOLGAN (No. 5344) IS ALSO AN ADJUDICATION IN FAVOR OF THESE DEFENDANTS OF THE SECOND SPECIAL DEFENSE PLEADED IN THIS ANSWER.**

Moreover, the judgment in *Lineker v. McColgan* (No. 5344) is also an adjudication in favor of these defendants of the second special defense set up in their answer in the case at bar (Tr. in No. 3964, p. 55). In this special defense, it is alleged that on September 2, 1914 (the date of the sale under the first deed of trust and the date of the new note and deed of trust for \$2455), there was a stating of an account between Frederick Lineker and Daniel A. McColgan, under which it was then agreed that nothing was owing to Lineker and that Lineker owed Daniel A. McColgan \$2455.

In *Lineker v. McColgan* (No. 5344) the court found that the giving of the new note and deed of trust for \$2455 constituted an account stated. (Finding X at p. 87 of Defendants' Exhibit "A", Tr. in No. 3904, p. 121.)

In the decision of the District Court of Appeal (page 561 of opinion forming a part of remittitur, Defendants' Exhibit "B"), the court said:

"The court further found that, at the time the note for \$2,455 and the second trust deed were executed, such note 'was intended by said Fred. V. Lineker and by said Daniel A. McColgan to be and was in fact an account stated between' them, and 'was intended to be and was in fact a final accounting * * * of all debts and financial transactions between them up to the time of said execution of said promissory note.' Since there is evidence to support the findings they are conclusive on appeal."

A former adjudication in regard to an affirmative defense to an action is as effective as a plea of *res judicata* as is a former adjudication against the plaintiff on some matter contained in the plaintiff's complaint.

In *Williams v. MacDonald*, 180 Cal. 547, the Supreme Court said:

"if the judgment-roll shows that the judgment did go to the merits of the second action, either in regard to some matter which the plaintiff must make out in order to entitle him to a recovery, *or in regard to some affirmative defense, which is a defense to the second action as well as to the first, then the judgment is a bar.* (Toomy v. Hale, 100 Cal. 172, (34 Pac. 644); Reed v. Cross, 116 Cal. 473, 485, (48 Pac. 491);

Green v. Thornton, 130 Cal. 482, (62 Pac. 750); Lamb v. Wahlenmaier, 144 Cal. 91, (103 Am. St. Rep. 66, 77 Pac. 765); Koehler v. Holt etc. Co., 146 Cal. 335, (80 Pac. 73); Estate of Harrington, 147 Cal. 124, (109 Am. St. Rep. 118, 81 Pac. 546).)"

The question of law as to the sufficiency of the facts upon which was based the finding of an account stated is not open to inquiry in the case at bar. However, the cases of *Bledsoe v. Stuckey*, 31 Cal. App. Dec. 1054, and *Kinley v. Thelen*, 158 Cal. 175, fully justify the finding. Both these cases hold that the giving of a new note under the circumstances shown by the pleadings in the case at bar constituted an account stated between the parties, and that they cannot, in the absence of a chargee of fraud or mistake, be permitted to reopen questions which were then closed.

Even if the issues presented by the complaint in the case at bar had not been determined adversely to plaintiffs in *Lineker v. McColgan* (No. 5344) the affirmative defense of an account stated, which was in that action adjudicated in favor of the defendants, is a complete adjudication of the validity of that defense in the case at bar, for the matters there adjudicated are a defense to both actions. This is shown by the decision in *Williams v. MacDonald*, 180 Cal. 546, where the second action was on a different contract than the first action. In that case the defendant pleaded an affirmative defense to the contract counted upon in the first action and judgment was rendered in his favor on

this defense. It was held that this adjudication was conclusive of the same defense pleaded to the second action, although the second action was for a different cause of action.

The matter is covered also by the decision of the Supreme Court of the United States in *S. P. Co. v. U. S.*, 168 U. S. 48, where the second action was for an entirely different cause of action from the first action. The court said:

“A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action.”

5. APPELLEES' AUTHORITIES.

In *Southern Pacific Co. v. U.S.*, 168 U. S. 48, the Supreme Court said:

“The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first

suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In *Davis v. Brown*, 94 U. S. 428, the court said (p. 428):

"The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

To the same effect is

Dowell v. Applegate, 152 U. S. 343.

When records of former judgment appear conclusive trial is at an end and no evidence should be received.

Packet Co. v. Sickles, 5 Wall. 593, 594.

Even when the second suit is for a different cause of action the former adjudication of a matter of fact or law is equally conclusive.

In *Cromwell v. Sac. County*, 94 U. S. 351, the Supreme Court said:

"that a judgment upon the merits constitutes an absolute bar to a subsequent suit upon the

same cause of action in respect to every matter offered and received in evidence, or which might have been offered to sustain or defend the claim in controversy, while if the second action is upon a different claim or demand the judgment in the prior action operates as an estoppel, only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered, the inquiry in such case being 'as to the point or question actually litigated and determined in said action, not what might have been litigated or determined.' "

In *New Orleans v. Citizens etc.*, 167 U. S. 396, the Supreme Court said:

"The estoppel resulting from the judgment does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment."

In *Bank v. Beverley*, 1 How. 139 (cited in 167 U. S. 396), it was held that the construction of a will affecting the right of parties must govern in subsequent controversies between the parties and their privies without reference to the different nature of the demands.

So where construction of contract is in controversy, such construction will bind parties in all future disputes.

Tioga v. Blossberg, 20 Wall. 137;

Mason v. Buchtel, 101 U. S. 638.

The following cases illustrate the rule that in order to support an estoppel, it is sufficient if the matters involved in the former action were substantially the same as those in the present action, and the rule that if a claim or defense might have been litigated in the former suit the judgment there is an estoppel although the claim or defense was not in fact litigated therein.

“A record produced to support a plea of res judicata should be of a judgment in a suit in which the causes of action subsequently sued upon might have been proved.”

Athearn v. Brarman, 8 Blackf. 440 (Ind.);

Marsh v. Masterson, 50 N. Y. Super. Ct. 187;
affirmed 101 N. Y. 501.

Judgment in action to compel reconveyance to plaintiff on ground that defendant had failed to apply the rents and profits to plaintiff's benefit as it was alleged he had agreed to do, is bar to subsequent action against same defendant in which she alleged that defendant had failed to perform a contract to support plaintiff out of the rents in consideration of the conveyance.

Wolverton v. Baker, 98 Cal. 628.

Judgment for defendant in action for malicious prosecution is bar to subsequent suit against defendant for slander for the same accusation as the one on which he was arrested, although slander was uttered on a different occasion, but before suit for malicious prosecution was filed.

Tidwell v. Weatherspoon, 58 Am. Rep. 665
(Fla.).

Judgment rendered in favor of defendant in action for specific performance is bar to action to reform the contract and enforce it as reformed.

Thomas v. Joslyn, 36 Minn. 1 (29 N. W. 344).

A sued on note given for the price of sheep. The defense was that the sheep were diseased. Judgment was for plaintiff. Subsequently B sued A for breach of warranty in the sale of the sheep, charging that they were diseased. Held first judgment a bar.

Ehle v. Bingham, 7 Barb. 494.

Although case made by bill as to the details of the transaction and the matters of evidence of fraud differed from the case tried in the former suit, the gravamen of the case was the same in each and the judgment in the former suit was *res judicata*.

Oglesly v. Atrell, 20 Fed. 570.

In *Stockton v. Ford*, 59 U. S. 418 (18 Howard) the Supreme Court said:

“One of the questions now sought to be agitated again is precisely the same as this one in the previous suit; namely, the right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied; namely, the equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs

provided for in the assignment to Jones. But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or partial interest in the mortgage. We are satisfied, therefore, that the former suit constitutes a complete bar to the present.”

Holder of note secured by second mortgage, who was made party to foreclosure suit by holder of prior mortgage, and who failed to enforce his note in that suit, cannot commence another suit on note as judgment in first suit was *res judicata*.

Brown v. Willis, 67 Cal. 235.

In suit by purchaser at execution sale against fraudulent grantee of judgment debtor to set aside deed, the fraudulent grantor was made a party and judgment rendered in favor of plaintiff. Held *res judicata* in an action by fraudulent grantor attacking the execution sale on ground that property was his homestead.

Snapp v. Snapp, 9 S. W. 705 (Ky.).

A party failing to assert a claim in equity, when it might have been litigated with propriety, will not be permitted afterwards to enforce it in a second suit.

Stewart v. Stebbins, 30 Miss. 66.

Complainant in proceedings for specific performance of contract for conveyance of coal land is estopped by a decree in his favor from maintaining an action at law for the injury to the lands committed during the pendency of the suit in equity.

Head v. Melovey, 2 Atlantic 195 (Pa.).

To the same effect are:

Nelson v. Bridges, 2 Beav. 239;

Prothers v. Phelps, 25 Law J. (N. S.) 105.

A judgment or decree rendered in a former suit is conclusive between the parties as to all matters presented and litigated therein, and as to all matters which might have been litigated or determined.

30 *Century Dig.*, Title "Judgments", Section 1241 and cases cited.

Where facts were known to complainant at time of commencement of prior suit covering the same subject matter, another action cannot be based on such facts, though they were mispleaded or not set up at all in former action.

Hightower v. Cravens, 70 Ga. 475.

In an action for an injunction to restrain an ejectment suit, plaintiff claimed an equity in the property under a contract and deed from a non-resident married woman. The bill was denied on the ground that a non-resident married woman could convey no title. Another ejectment suit was

begun in which the plaintiff in the injunction suit (who was a defendant therein) pleaded that the property was the separate property of the married woman. The facts on which this defense was based had not been relied upon in the injunction suit. Held, nevertheless, that the judgment against plaintiff in the injunction suit operated as a bar.

Rogers v. Higgins, 57 Ill. 244.

6. DISCUSSION OF AUTHORITIES ON RES JUDICATA CITED BY APPELLANTS.

Appellants cite the case of *Southern Pacific Company v. Bogert*, 250 U. S. 483. Counsel seem to contend that this case established a new, or at least greatly modified, doctrine concerning the plea of *res judicata*. The quotation from the opinion of the court contained in appellants' brief shows that the Supreme Court announced no new doctrine. In referring to the other actions the Supreme Court in that case said:

“In none of these suits was the question here in issue decided.”

In *Southern Pacific Co. v. Bogert*, *supra*, the Southern Pacific Company, which held the ma-

majority of the capital stock of Houston Texas Central Railway, reorganized that company. Pursuant to the reorganization agreement mortgages upon the property of the Houston Company were foreclosed, a new company designated Houston & Texas Central *Railroad* Company was incorporated, the property of the old Company was transferred to the new Company, and all of the capital stock of the new Company was issued to the Southern Pacific Company. The action in *S. P. Co. v. Bogert, supra*, was brought by the minority stockholders in the old Houston Company "to have the Southern Pacific Company declared trustee for them of the stock in the New Houston Company and for an accounting" (p. 486).

The Supreme Court, at page 487, described the action as follows:

"In considering the many objections urged against the decree, it is important to bear constantly in mind the exact nature of the equity invoked by the bill and recognized by the lower courts. The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific and by it alone. The wrong consists in its failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control. In other words, the minority assert the right to a pro rata share of the common property; and equity enforces the right by declaring the trust on which the Southern Pacific holds it and ordering distribution or compensation."

It appeared that the minority stockholders in the old Houston Company had prosecuted a number of actions, most of which were against the old company itself. (See list of cases in margin at page 489.) By these actions the minority stockholders sought to set aside the foreclosure sale held under the reorganization agreement, and also sought to have the reorganization agreement declared fraudulent. But none of the former actions were in any sense actions to have the Southern Pacific Company declared a trustee for a part of the stock of the new Houston Company. In referring to the former actions the Supreme Court said (p. 490):

“Except in so far as those cases were disposed of on objections to jurisdiction, they decided merely that the foreclosure could not be set aside as fraudulent; that the minority stockholders could not have the reorganization agreement declared fraudulent; and that they could not compel a reduction of the assessment made under it or enjoin distribution of the stock according to its terms.”

It is obvious that the issue as to whether the Southern Pacific Company held certain stock in the new Houston Company as trustee for the plaintiffs was not, *and could not have been*, in issue in the former actions, as these actions sought to repudiate the whole transaction whereby the Southern Pacific Company became the holder of the stock of the new Houston Company.

In fact the contention in the *Bogert* case was rather “estoppel by election” than estoppel by judgment.

Appellants cite *Russell v. Place*, 94 U. S. 606, where the Supreme Court said,

“If it appear that several distinct matters may have been litigated, upon one or none of which the judgment may have passed without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.”

The following is an excerpt from the syllabi in *Russell v. Place*, *supra*:

“In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims, one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheep skin, by means of a compound composed and applied in a particular manner, the declaration alleged, as the infringement complaint of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather, or in the use of the process specified. Held, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing

by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery: a patent may be valid as to a single claim and invalid as to the others.”

CONCLUSION.

Although the pleadings in the case at bar and in the two actions in which the judgments pleaded were rendered are quite voluminous the facts in this whole transaction are very simple.

On September 2, 1914 a sale was made under the first deed of trust. On the same date a new deed of trust for \$2455.00 was made for the benefit of Daniel A. McColgan, who was also the beneficiary under the first deed of trust.

By the action of *Lineker v. McColgan* (No. 5344) the plaintiff sought to recover the alleged surplus proceeds of the sale made under the first deed of trust on September 2, 1914. He also sought to have the sale under the second deed of trust enjoined, claiming that there was due to him as the proceeds of the sale under the first deed of trust a sum in excess of \$2455.00, the amount of the second deed of trust. The complaint also attacked the validity of this deed of trust alleging that it was given, not as security for the promissory note for \$2455.00 referred to therein, but to protect Daniel A. Mc-

Colgan against any liens which he might have to pay on the land.

In *Lineker v. McColgan* (No. 5344) it was adjudicated that the plaintiff was not entitled to any part of the surplus proceeds of the sale held on September 2, 1914, and it was also adjudicated that the second deed of trust was given (as it purported to have been given) to secure the sum of \$2455.00 borrowed from Daniel A. McColgan by R. S. Marshall, as the agent of, and trustee for, the Linekers.

Likewise in the action of *Marshall v. McColgan* (No. 5353) the validity of the second deed of trust was adjudicated.

It is obvious, therefore, that the cause of action herein sued upon is the very cause of action adjudicated adversely to the Linekers in the action of *Lineker v. McColgan* (No. 5344) and in the action of *Marshall v. McColgan* (No. 5353) for in this action the plaintiff seeks to recover the alleged surplus proceeds of the sale held on September 2, 1914, and also attacks the validity of the second deed of trust for \$2455.00.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,

March 20, 1925.

ALFRED J. HARWOOD,

Attorney for Appellees Adelaide McColgan, administratrix, etc., and R. McColgan.



No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINEKER, et al.,

VS.

MARSHALL, et al.,

Appellants,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

JOHN L. TAUGHER,

GLENSOR, CLEWE & VAN DINE,

Mills Building, San Francisco,

Attorneys for Appellants

and Petitioners.

CORMAC, BOLLES & SURR,

Alaska Commercial Building, San Francisco,

GOLDMAN, NYE & SPICER,

Mills Building, San Francisco,

Of Counsel.

FILED

SEP 1 - 1925

F. D. MONCISTO



No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINEKER, et al.,

Appellants,

vs.

MARSHALL, et al.,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of plaintiffs and appellants respectfully shows, that they are aggrieved by the decision hereinbefore made on the 3rd day of August, 1925, and they pray that a rehearing of said cause be granted, and that upon said rehearing the decree of the District Court be reversed and a trial be ordered upon the merits.

GROUND FOR A REHEARING.

For cause for said rehearing, plaintiffs and appellants respectfully show that in reaching the deci-

sion herein, the Honorable Court has overlooked essential allegations of fact in plaintiffs' amended complaint herein, which entirely distinguish and differentiate this cause from the matters adjudicated in Action No. 5344, determined by the District Court to be *res adjudicata* herein.

Stating the matter most succinctly: Action No. 5344 was an attack upon a promissory note. The action at bar is an attack upon the trust deed purported to have been given to secure said note; Action No. 5344 was an attempt to determine by an accounting that the note was paid, the action herein is to determine among other things that the trust deed was fraudulent and void.

Action No. 5344 was the only action referred to in the decision of the District Court and we take it was the only basis for the decision of *res adjudicata* reached in that court. Certainly, it is the only action to which Lineker has been a party, and consequently it is the only one to which we will direct attention.

**ESSENTIAL FACTS DISTINGUISHING CASE AT BAR FROM
CASE NO. 5344, ON WHICH DECISION RES ADJUDICATA
IS BASED.**

The latter portion of paragraph thirteen of plaintiff's amended bill of complaint herein, is as follows:

“That on said 2nd day of September, 1914, and without any real consideration whatever

passing from the said R. McColgan or Daniel A. McColgan to the plaintiffs herein or to said R. S. Marshall, the said R. S. Marshall and his wife, Olive H. Marshall, wrongfully and unlawfully, and in fraud of the plaintiff's rights herein, made or attempted to make a certain Deed of Trust to the defendants R. McColgan and Eustace Cullinan, as trustees for the defendant Daniel A. McColgan, for the sum of two thousand four hundred and forty-five dollars (\$2445.00), or thereabouts."

The said allegation is set forth in brief for appellant filed herein, at page nine.

In case No. 5344 the issues briefly were as follows: Plaintiff Lineker sought an accounting, and sought to have it adjudged that upon said account there was more than two thousand four hundred forty-five dollars (\$2445.00) in defendant McColgan's hands to pay the note for said amount, and the prayer that sale under a trust deed given by R. S. Marshall to secure said note, be enjoined. The accounting was denied; the injunction was denied; and the Court decreed that the note for two thousand four hundred forty-five dollars (\$2445.00) was given in settlement of accounts between Lineker and McColgan.

The injunction prayed against the sale under the trust deed was only incidental and would necessarily have followed from a determination that no debt existed. But the trust deed was not attacked, nor its validity determined. The determination

that there was a debt in nowise determines that there was a valid trust deed securing the debt.

Considering these matters in relation to the allegations of plaintiffs' amended bill of complaint, hereinabove quoted, it is readily apparent that the action herein is to avoid a trust deed on the ground that it was given and received in fraud. No issue of this nature whatever was made in Action No. 5344. The matter of fraud was not involved therein. It is one thing to sue to determine that a note is paid and that the sale under a deed of trust therefor should be enjoined, and it is quite another thing to sue to determine that the deed of trust was procured by fraud. Here are two separate and distinct bases of action in no way related to each other.

Non constat but that a note may be perfectly valid and yet a deed of trust claimed to secure the same may be entirely fraudulent and void; and the fact that plaintiffs have not succeeded in establishing that a note was paid in the prior Action No. 5344, in no way should affect or bar their right to proceed in an action to avoid a deed of trust and sale thereunder. *The attack in the two cases is against different instruments and obligations.* There has never been at any time any adjudication upon the question whether or not the deed of trust for the note of two thousand four hundred forty-five dollars was fraudulently obtained.

ERRORS IN LAW.

It seems, on page twelve of the opinion hereinbefore filed, that the Court recognizes that the cause of action herein is different from the cause of action adjudicated in Action No. 5344, but nowhere in its opinion does the Court give the full effect arising in law from *difference in cause of action* upon the question of *res adjudicata*. The conclusion that the cause of action herein is different, immediately places the case at bar in the second class of those mentioned in the case of *Cromwell v. Sacramento*, 94 U. S. 51 at 352, quoted at the top of page seven of the opinion herein as follows:

“In considering the operation of this judgment, it should be borne in mind as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as estoppel in another action between the same parties upon a different claim, or cause of action. In the former case, the judgment, if rendered on the merits, constitutes an absolute bar to a subsequent action. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted.”

Considering this distinction, and having in mind that the cause of action herein is not the same as that set forth in case No. 5344, the decision in case No. 5344 is not an absolute bar to the action herein,

but is only a bar as to identical facts in issue. And the question of fraudulent procurement of the trust deed was not in issue in the earlier action.

“Altho a judgment may be conclusive evidence on any point litigated and decided between the same parties, yet it is not pleadable in bar of a second action, unless it is founded on the same identical, or substantially identical cause of action.” 34 C. J. 802.

“As the suit in the Michigan Court was not upon the identical cause of action litigated in the United States Circuit Court, the estoppel operates only as to matters in issue, or points controverted and actually decided in that suit.”

Radford v. Myers, 231 U. S. 725, 730.

“Where a second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence, or which may have been offered to sustain or defeat the claim in controversy; but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit.”

Troxell v. Delaware, Lackawanna Railway Company, 227 U. S. 434, 440.

Since the cause of action herein and the cause of action in the prior case No. 5344 are different, the quotation in the opinion of the Court, page 9, from *Davis v. Brown*, 94 U. S. 423, 428, is not applicable. The rule is when the causes of action are not the same, then the prior action is a bar only as to what was actually adjudicated and not as to what might have been adjudicated.

“On the other hand where the causes of action involved in the two actions are different, the judgment cannot operate as a bar, even tho it may defeat the second action, because it conclusively and negatively adjudicates some fact essential to maintain the latter. *Under such circumstances the estoppel does not extend to matters which might have been litigated in the first action*, but is limited to those matters or issues common to both actions which were either expressly or by necessary implication adjudicated in the first.” (*Freeman on Judgments*, Fifth Edition, Section 677, page 1429 (italics ours)).

And in view of this principle, it is submitted that the Court herein is in error in its opinion on page nine, in holding that the former case is a bar by facts determined therein, or *which “might have been brought forward and determined”*. The principle “might have been brought forward and determined” *applies only to a situation wherein the causes of action are identical*, and has no application to the case at bar.

That the evidence in the former case did not establish an agreement upon the part of McColgan to purchase said property for the benefit of Lineker, and did not establish an agreement by McColgan to account for the proceeds of the sale under the first trust deed, is not an adjudication that these matters did not, or would not, establish fraud on the part of McColgan in the transaction which would avoid the second deed of trust here in controversy.

CONCLUSION.

The transaction wherein plaintiffs lost their property was a stench in the nostrils of the late Honorable Wm. C. Van Fleet. It was characterized by him as "little less than downright robbery". There seems no doubt that plaintiffs did in fact lose their property by unsurpassed trickery of the notorious McColgans.

In the prior Action No. 5344, plaintiff failed in his attempt to establish an express contract on the part of McColgans to account for the fourteen thousand dollars (\$14,000) received on sale under the first deed of trust; and plaintiff also failed to establish an express agreement of McColgan to purchase the property for his benefit, but the fact that the evidence failed to establish such express agreement, is not an adjudication and does not determine fraud on the part of the McColgans sufficient to avoid the second deed of trust, which is the subject of this action; and that there has been an adjudication that the note for two thousand four hundred forty-five dollars (\$2445.00) was in settlement of accounts between plaintiff and McColgans, is not an adjudication that the deed of trust, an entirely separate and distinct instrument, was valid and enforceable. The note may have been good and the deed of trust invalid and void.

Your petitioners are about to be cheated of the fruits of a lifetime of effort by chicanery and treachery, and respectfully urge this Honorable

Court to grant them an opportunity to be fully heard in the District Court.

Plaintiffs earnestly seek the assistance of the long arm of equity in untangling the warp and woof of fraud whereby they have lost their property. Accordingly, they pray that a rehearing be granted herein and that thereupon the decree of the District Court sustaining the technical plea of *res adjudicata* be reversed and that a trial be ordered upon the merits.

Dated, San Francisco,
September 1, 1925.

Respectfully submitted,
JOHN L. TAUGHER,
GLENSOR, CLEWE & VAN DINE,
*Attorneys for Appellants
and Petitioners.*

CORMAC, BOLLES & SURR,
GOLDMAN, NYE & SPICER,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 1, 1925.

DOUGLAS A. NYE,
*Of Counsel for Appellants
and Petitioners.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. S. NUNN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

FILED

DEC 24 1924

F. O. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

B. S. NUNN,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

ZIMMERMAN & MULHERN, Phoenix, Ariz.,
Attorneys for Plaintiff in Error.

GEORGE T. WILSON, Assistant U. S. Attorney,
Phoenix, Ariz.,
Attorney for Defendant in Error.

In the District Court of the United States for the
District of Arizona.

C-2161—PX.

THE UNITED STATES

vs.

B. S. NUNN.

INFORMATION.

Violating Section 3, Title 2, Act Oct. 28, 1919, Pos-
sessing Intoxicating Liquor.

United States of America,
District of Arizona,—ss.

BE IT REMEMBERED, That Geo. T. Wilson,
Assistant Attorney of the United States for the
District of Arizona, who prosecutes in behalf and
with the authority of the United States, comes here
in person into court at this October, 1924, Term
thereof, and for the United States gives the Court
to understand and be informed that one B. S. Nunn,
on or about the 30th day of August, A. D. 1924, and

within the said District of Arizona, did wilfully and unlawfully have in his possession certain intoxicating liquor, to wit: approximately seventy-five gallons of whiskey, which said intoxicating liquor was then and there fit for use for beverage purposes, he, the said B. S. Nunn, then and there having no lawful permit to possess the said intoxicating liquor; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

That the said defendant has heretofore been convicted upon the charge of transporting intoxicating liquor in violation of the Act of Oct. 28, 1919, upon his plea of guilty on April 17, 1923, the files and records of which said conviction is on file in the Clerk's Office of this Court under case numbered Phoenix 1729-Criminal.

That the said defendant has heretofore been bound over by a United States Commissioner for the District of Arizona to await the further action of this Court [1*]

Whereupon, the said United States Attorney for the District aforesaid prays the consideration of this Court here in the premises, and that due process of law may be awarded against the said B. S. Nunn, defendant, in this behalf to make him answer to the United States touching and concerning the premises.

*Page-number appearing at foot of page of original certified Transcript of Record.

Dated at Phoenix, Arizona, 20th day of October,
A. D. 1924.

GEO. T. WILSON,
Asst. United States Attorney for the District of
Arizona.

United States of America,
District of Arizona,—ss.

I, Geo. T. Wilson, Assistant United States At-
torney for the District of Arizona, being sworn,
do say that the foregoing information is true as I
verily believe.

GEO. T. WILSON.

Subscribed and sworn to before me this 20th
day of October, A. D. 1924.

[Seal] CHAS. H. ADAMS,
Deputy Clerk United States Dist. Court for the
District of Arizona.

[Endorsed]: Filed Oct. 20th, 1924. C. R. Mc-
Fall, Clerk. By Chas. H. Adams, Deputy.

In the District Court of the United States for the
District of Arizona.

(No. C-2161—PHOENIX.)

THE UNITED STATES

vs.

B. S. NUNN.

DEMURRER TO INFORMATION.

Now comes B. S. Nunn, by his attorneys, Zimmerman & Mulhern, and demurs to the information filed in the above-entitled court and cause for the reason that said information and the charges and facts herein set forth do not constitute a violation of law or a public offense, in this, to wit:

That said information does not state that the possession alleged was at a time and place where possession was unlawful or illegal and that said information does not state that said intoxicating liquor was possessed in any particular place and that said information does not state that said intoxicating liquor was possessed at a particular place other than a place where such possession is lawful.

WHEREFORE, the defendant requests that said information be dismissed and held for naught and that he be exonerated therefrom.

October 22, 1924.

ZIMMERMAN & MULHERN,
Defendant's Attorneys.

[Endorsed]: Filed Oct. 22, 1924. C. R. McFall,
Clerk. By Chas. H. Adams, Deputy Clerk. [2]

In the District Court of the United States for the
District of Arizona.

(No. C-2162—PHOENIX.)

THE UNITED STATES

vs.

B. S. NUNN.

MOTION TO QUASH AND SET ASIDE IN-
FORMATION.

Now comes B. S. Nunn, by his attorneys, Zimmerman & Mulhern, and moves this Court for its order quashing and setting aside the information filed in the above-entitled court and cause for the reasons, to wit:

That the charges and facts set forth in said information do not constitute a violation of law or a public offense in that said information does not state that said intoxicating liquor was possessed at a particular place other than at a place where such possession is lawful, or in any manner contrary to law.

That said intoxicating liquor alleged in said information to have been possessed, on or about the 30th day of August, A. D. 1924, by the defendant, B. S. Nunn, was, if possessed, at No. 1102 South Central Avenue, city of Phoenix, Maricopa County, Arizona, in said Federal District, said 1102 South Central Avenue being, then and there, the private dwelling of said B. S. Nunn, and being, then and

there, occupied and used by him as his dwelling only.

That the official record and testimony had and produced at the preliminary hearing before R. A. Kirk, Commissioner in said Federal District, on the 16th of September, 1924, at Phoenix, in said district, is hereto attached and filed herewith as a part of this motion.

October 22, 1924.

ZIMMERMAN & MULHERN,

Defendant's Attorneys.

[Endorsed]: Filed Oct. 22, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.
[3]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Saturday, October 25, 1924.)

No. C-2161 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. S. NUNN,

Defendant.

MINUTES OF COURT—OCTOBER 25, 1924—
ORDER OVERRULING DEMURRER, etc.

Messrs. L. F. Zimmerman and D. V. Mulhern are present for the defendant.

Arguments are now heard on the defendant's demurrer, whereupon said demurrer is ordered overruled. The defendant excepts to the ruling, and the exception is ordered allowed.

Arguments are heard on defendant's motion to quash and set aside the information herein, and said motion is ordered denied. An exception is ordered allowed the defendant. [4]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Wednesday, November 5, 1924.)

No. C-2161 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. S. NUNN,

Defendant.

MINUTES OF COURT—NOVEMBER 5, 1924—
PLEA.

The defendant, B. S. Nunn, is present in person with his counsel, L. F. Zimmerman, Esq., and having heretofore been duly arraigned, said defendant now pleads Not Guilty, which plea is duly entered. [5]

C-2161 (PHOENIX).

UNITED STATES OF AMERICA,
Plaintiff,
Against
B. S. NUNN,
Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Guilty in manner and form as charged in the information.

BYRON CARR,
Foreman.

[Endorsed]: Filed Nov. 6, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [6]

In the District Court of the United States for the
District of Arizona.

No. C-2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

MOTION IN ARREST OF JUDGMENT.

And now after verdict against the defendant, B. S. Nunn, and before sentence, comes the said defendant in his own proper person, and by F. L. Zimmerman, his attorney, and moves the Court here to arrest judgment herein and not pronounce the same, for the following reasons, to wit, that the information filed in this cause does not charge any public offense or any violation of law, in that it does not state that the possession of intoxicating liquor alleged was such possession as is prohibited by the National Prohibition Act and does not state the place of such alleged possession; because of which said errors in the record herein no lawful judgment can be rendered by the Court upon the record in this cause.

November 6, 1924.

B. S. NUNN,
Defendant.

By F. L. ZIMMERMAN,
Attorney for Defendant.

[Endorsed]: Filed Nov. 6, 1924. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [7]

Regular October, 1924, Term, at Phoenix.

In the United States District Court in and for the
District of Arizona.

Honorable F. C. JACOBS, United States District
Judge, Presiding.

(Minute Entry of Saturday, November 8th, 1924.)

No. C-2161 (PHOENIX).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. S. NUNN,

Defendant.

MINUTES OF COURT—NOVEMBER 8, 1924—
JUDGMENT.

The defendant, B. S. Nunn, is present in person and with counsel, L. F. Zimmerman and D. V. Mulhern, Esquires, and is now duly informed by the Court of the nature of the crime charged in the information herein, to wit, unlawful possession of intoxicating liquor, in violation of Section 3, Title 2, Act of October 28, 1919; of his trial and conviction thereof by jury. And no legal cause appearing why judgment should not be imposed, the Court renders judgment as follows:

That the said defendant having been duly convicted of said crime, the Court now finds him guilty thereof, and does ORDER, ADJUDGE AND DECREE that as a punishment therefor he shall pay a fine of Five Hundred Dollars (\$500.00); and that he shall stand committed to the county jail of Maricopa County, Arizona, until said fine is paid or he is otherwise discharged by due course of law.

The defendant excepts to the verdict and judgment rendered.

Supersedeas bond on appeal is ordered fixed at \$750.00.

IT IS FURTHER ORDERED that the defendant is allowed twenty (20) days in addition to time provided by law within which to prepare, serve, file and settle his bill of exceptions herein. [8]

In the District Court of the United States for the
District of Arizona.

No. C-2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

PETITION FOR WRIT OF ERROR.

To the Honorable F. C. JACOBS, Judge of the
District Court of the United States, for the
District of Arizona:

And now comes B. S. Nunn, the defendant in the
above-entitled cause, and feeling himself aggrieved

by the verdict of the jury and the judgment of the District Court of the United States, for the District of Arizona, entered on the 8th day of November, 1924, hereby petitions for an order allowing him, said defendant, to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit to the District Court of the United States, for the District of Arizona; that said writ of error may be made a supersedeas, and that your petitioner be released on bail in an amount to be fixed by the Judge thereof, pending the final disposition of said writ of error. Assignment of errors is filed with this petition.

Nov. 8, 1924.

B. S. NUNN.

By F. L. ZIMMERMAN,

By D. V. MULHERN,

His Attorneys.

Service of copy hereof hereby acknowledged
11/8/1924.

GEO. T. WILSON,

Asst. U. S. Atty.

[Endorsed]: Filed Nov. 8, 1924. C. R. McFall,
Clerk. By Chas. H. Adams, Deputy Clerk. [9]

In the District Court of the United States for the
District of Arizona.

No. C-2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

ASSIGNMENT OF ERRORS.

And now comes B. S. Nunn, the plaintiff in error, and in connection with his petition for a writ of error says that in the record, proceedings, and judgment aforesaid, error has intervened to his prejudice, to wit:

(1) The Court erred in overruling the demurrer of defendant to the information filed against him in this cause;

(2) The Court erred in denying and overruling the motion of defendant to quash the information filed against him, because the alleged possession of liquor was at a place where such possession was not prohibited or unlawful, to wit, defendant's private dwelling;

(3) The Court erred over the objection and exception of the defendant in admitting any evidence whatsoever in support of the information because said information does not sufficiently charge the defendant with any public offense or violation of the National Prohibition Act;

(4) The Court erred in denying and overruling the defendant's motion made at the close of all

the evidence to direct the jury to find the defendant not guilty because the evidence conclusively shows that the liquor was possessed in defendant's private dwelling while used and occupied by him for that purpose only and because the information fails to charge and the evidence fails to show that the liquor so possessed by the defendant in his private dwelling was possessed for an unlawful purpose and in an unlawful manner. [10]

(5) The Court erred in overruling and denying the motion of the defendant in arrest of judgment because the information fails to charge any public offense or any violation of the National Prohibition Act.

WHEREFORE, said plaintiff in error prays that the judgment of the District Court of the United States may be reversed and held for naught, et cetera.

Nov. 8, 1924.

B. S. NUNN.

By F. L. ZIMMERMAN,

D. V. MULHERN,

Attorneys for Plaintiff in Error.

Service of copy acknowledged this 8th of November, 1924.

GEO. T. WILSON,

Asst. U. S. Attorney.

[Endorsed]: Filed Nov. 8, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.
[11]

In the District Court of the United States for the
District of Arizona.

No. C-2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

ORDER ALLOWING WRIT OF ERROR AND
ADMITTING DEFENDANT TO BAIL.

Let a writ of error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Arizona, as prayed for in the petition of the said B. S. Nunn; and let a citation be issued to the defendant in error.

IT IS ORDERED that the writ of error, allowed as above stated, operate as a supersedeas, and the defendant be admitted to bail, upon furnishing a bond in the penal sum of Seven Hundred Fifty no/100 Dollars (\$750.00), conditioned according to law to be approved by me.

Nov. 8, 1924.

F. C. JACOBS,
Judge.

Service of copy hereof acknowledged this 8th of
November, 1924.

GEO. T. WILSON,
Asst. U. S. Atty.

[Endorsed]: Filed Nov. 8, 1924. C. R. Mc-Fall, Clerk. By Chas. H. Adams, Deputy Clerk.
[12]

In the District Court of the United States for the
District of Arizona.

No. C-2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

CITATION ON WRIT OF ERROR.

The United States of America,—ss.

The President of the United States to the United
States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, within thirty days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States in and for the District of Arizona, and filed in the clerk's office of said court on the 8th day of November, 1924, in a cause wherein B. S. Nunn is plaintiff in error and you are defendant in error, to show cause, if any, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be reversed and corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable F. C. JACOBS, Judge of the District Court of the United States in and for the District of Arizona, this eighth day of November, A. D. 1924, and of the Independence of the United States the one hundred and forty-ninth.

F. C. JACOBS,
District Judge.

[Seal]

Attest: C. R. McFALL,
Clerk.

By Chas. H. Adams,
Deputy Clerk. [13]

Service of the within citation and receipt of a copy is hereby admitted this 8th day of November, 1924.

GEO. T. WILSON,
U. S. Attorney,
Attorney for Defendant in Error.

[Endorsed]: Filed Nov. 8, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [14]

C.-2161—(PHOENIX).

WRIT OF ERROR.

United States of America,—ss.

The President of the United States, to the Honorable The Judges of the United States for the District of Arizona, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a cause which is in

the said District Court before you, or some of you, between the United States, plaintiff, and B. S. Nunn, defendant, manifest error has happened, to the great damage of the said B. S. Nunn, defendant, as by his complaint appears, we, being willing that error, if any, should be duly corrected, and full, speedy justice done to the parties aforesaid in this behalf, do command, if judgment be given therein, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, in said circuit on the 6th day of December, 1924, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the eighth day of November, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal]

CHAS. H. ADAMS,
Deputy Clerk of the United States District Court
for the District of Arizona.

Allowed by

F. C. JACOBS,
Judge.

Service of copy of this hereby acknowledged this 8th of Nov., 1924.

GEO. T. WILSON,
Asst. U. S. Atty.

[Endorsed]: Filed Nov. 8, 1924. C. R. McFall,
Clerk. By Chas. H. Adams, Deputy Clerk.

RETURN ON WRIT OF ERROR.

The Answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error:

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal] C. R. McFALL,
Clerk U. S. District Court for the District of Arizona.

By M. R. Malcolm,
Deputy Clerk. [15]

In the District Court of the United States for the
District of Arizona.

No. C-2161—PHOENIX.

Information for Violating Section 3, Title 2, Act of
October 28, 1919, Possessing Intoxicating
Liquor.

THE UNITED STATES

vs.

B. S. NUNN.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That upon the arraignment of the defendant in said cause at the October Term of said court, on October 22, A. D. 1924, he, by his counsel, demurred to said information, said demurrer being as follows, to wit:

“That said information does not state that the possession alleged was at a time and place where possession was unlawful or illegal and that said information does not state that said intoxicating liquor was possessed in any particular place and that said information does not state that said intoxicating liquor was possessed at a particular place other than a place where such possession is lawful,”

which said demurrer was overruled by the Court, to which ruling of the Court the defendant then and there duly excepted.

That defendant, at the same time and place, by his counsel, moved the Court for its order quashing and setting aside said information, said motion to quash and set aside information being as follows, to wit:

“That the charges and facts set forth in said information do not constitute a violation of law or a public offense in that said information does not state that said intoxicating liquor was possessed at a particular place other than at a place where such possession is lawful, or in any manner contrary to law. That said intoxicating liquor alleged in said information to have been possessed, on or about the 30th day of August, A. D. 1924, by defendant, B. S. Nunn, was, if possessed, at Number 1102 South Central Avenue, City of Phoenix, Maricopa County, Arizona, in said Federal District, said 1102 South Central Avenue, being then and there the private dwelling of said B. S. Nunn, and being then and there, occupied and used by him as his dwelling only. That the official record and testimony made and produced at the preliminary hearing before R. A. Kirk, U. S. Commissioner in said Federal District, on the 16th day of September, 1924, at Phoenix, in said District, is hereto attached and filed herewith as a part of this motion.” [16]

That said official record and testimony showed conclusively that at the time and place alleged in said information said 1102 South Central Avenue, Phoenix, Arizona, was the private dwelling of the defendant used and occupied by him as his dwelling

only; which said motion to quash and set aside information was, by the Court, denied, to which ruling of the Court defendant, then and there, duly excepted; and that said defendant, being on the 5th day of November, A. D. 1924, arraigned in person, appeared and pleaded not guilty to said information.

BE IT FURTHER REMEMBERED, that on the 5th day of November, A. D. 1924, being one of the days of the October term of said court, this cause came on to be heard before the Honorable F. C. Jacobs, one of the Judges of said court and a jury duly impaneled. George T. Wilson, Assistant United States District Attorney, appeared as counsel for the Government and F. L. Zimmerman and D. V. Mulhern, appeared as counsel for the defendant. The United States to maintain the issues on its part called as a witness one N. W. Matlock, who, after having been duly sworn, was asked his name and occupation whereupon defendant, by his counsel, then and there, objected to every and all evidence offered on behalf of the prosecution *or* the Government in support of the allegations contained in the information, on the ground and for the reason that the charges made therein do not state a public offense, nor a violation of law against the United States, but the objection was overruled by the Court, to which ruling of the Court the defendant, by his counsel, then and there, duly excepted. Whereupon the witness testified as follows: That on August 30, 1924, he, a captain of the police of the City of Phoenix, with four other police officers, went to the home

of defendant at No. 1102 South Central Avenue, in said city, in said Federal District, at a little after 2 o'clock in the afternoon, to search for intoxicating liquor under a search-warrant issued by the Acting City Magistrate of said city of Phoenix. That the officers entered the house and [17] found defendant and defendant's wife there, but no one else. After reading the search-warrant to defendant the officers searched the dwelling and found, in a little cellar under the bathroom, two barrels and three one-gallon glass containers of liquor, one barrel being full, the other part full, of whiskey. That they seized and removed the barrels and containers and took them to the Police Station, at said city of Phoenix, and with contents undisturbed turned them over to the Chief of Police, said city. The witness examined three glass containers and two barrels in the courtroom and identified them as being the same as seized from the dwelling of the defendant. Whereupon the glass containers were marked Government's Exhibits for Identification Numbers One, Two, and Three, and the barrels Numbers Four and Five. That he judged the capacity of the barrels to be about fifty gallons each, one being full, the other about half full. That at the time of the seizure witness, being in charge of the expedition, had no conversation with defendant relative the barrels, containers, or liquor, but did discuss the search-warrant with him. On cross-examination this witness testified as follows: That the liquor was found at defendant's residence and home, Number 1102 South Central Avenue, Phoenix, Arizona; that Number

1102 South Central Avenue is not a business place but is a private dwelling-house, consisting of about two bedrooms, a sleeping-porch, living-room, kitchen and bathroom; and that, of the witness' own knowledge, it is used by defendant and defendant's wife as their private dwelling. That he had no warrant for defendant's arrest, but took him in custody, and turned him over to the Chief of Police, said City of Phoenix. Police Officer Paul Ernest Sauer, after being first duly sworn, testified for the Government as follows: That he was present when defendant's residence at 1102 South Central Avenue, Phoenix, Arizona, said Federal District, was raided, and that Police Officers Matlock, O'Hagan and Vess were the others making the raid. [18] That the search of defendant's residence and the seizure therefrom of Government's Exhibits for Identification Numbers One, Two, Three, Four, and Five, were made as testified by witness Matlock; and witness testified no further. Police Officer Fred Vess, after being first duly sworn, testified for the Government as follows: That he was present during the search of defendant's residence on August 30, 1924, with Police Officers Matlock, Sauer and O'Hagan, and that the Government's Exhibits Numbers One, Two, Three, Four and Five, for Identification, and seized therefrom at that time. That Number 1102 South Central Avenue aforesaid is not a business place, but is a private dwelling and that, of his own knowledge, it was used by defendant and defendant's wife as their private dwelling; witness testified no further. Police Officer Ed O'Hagan, after being

first duly sworn, testified as follows: That he was present on August 30, 1924, with the other three police officers, when the premises occupied by the defendant were searched and that Government's Exhibits for Identification Numbers One, Two, Three, Four and Five, were seized from said premises. That he has had considerable experience in tasting intoxicating liquor and therefrom is able to state whether liquor is intoxicating, contains one-half of one per cent of alcohol by volume, what kind of liquor it is, and whether or not it is fit for use for beverage purposes. That immediately after the raid he tasted the contents of Exhibits for Identification Numbers One, Two, Three and Four, and that to his taste, it was very good whiskey, containing more than one-half of one per cent of alcohol by volume; that it was intoxicating liquor fit for use for beverage purposes; this was, substantially, all his testimony. Chief of Police George O. Brisbois, of Phoenix, Arizona, after being first duly sworn, testified for the Government as follows: That, on the 30th day of August, 1924, Police Officers Matlock and the other officers delivered to him, at his office, Government's Exhibits for Identification Numbers One, Two, Three, Four and Five; that he possessed the [19] said exhibits for quite a while but later delivered them to Prohibition Officer Kent; during his possession he did not disturb the contents other than to make a test out of some of them; which was all his testimony. Federal Prohibition Agent S. E. Kent, after being first duly sworn, testified for the Government as follows: That he saw the five Gov-

ernment's Exhibits for Identification in the custody of Chief of Police Brisbois; that they were later transferred to witness' office, to Government's storage, where they remained since; that seals were placed upon the exhibits in his presence; that said seals have not been tampered with or broken since; that the contents were in no way disturbed after received from the Chief of Police; that has had experience in the testing, tasting and drinking of intoxicating liquors and is able to take a drink of liquor and say what kind it is and whether or not it contains more than one-half of one per cent of alcohol by volume and whether or not it is intoxicating and fit for use for beverage purposes. Whereupon he sampled the contents from Exhibit Number Four for Identification and said it is whiskey containing more than one-half of one per cent of alcohol by volume, is intoxicating and fit for use for beverage purposes. That it is pretty good whiskey. Government's Exhibits for Identification Numbers One, Two, Three, Four and Five is all the liquor received, turned over to us, and said exhibits were then offered and received in evidence. No further testimony by the witness. Paul Dickason, after being first duly sworn, for the Government, took the stand and attempt was made to elicit testimony from him which was not received by the Court.

Here the Government rested its case.

Whereupon defendant, by his counsel, moved the Court to instruct the jury to return a verdict of

“Not guilty” on the ground that the Government’s proof is insufficient to establish the commission of any public offense or establish the violation of any law against the United States and that the evidence is insufficient to sustain [20] the allegations of the information and further that the evidence departs from the allegations in the information and that said information does not state a public offense or any violation of the laws of the United States; the evidence conclusively shows that the liquor was possessed in defendant’s private dwelling-house while same was used and occupied by him as his private dwelling only, it is not lawful under the National Prohibition Act for a person to have liquor in his possession in his private dwelling and in that case only. The evidence does not show and the information does not allege that the liquor was possessed at any place, or in any manner, other than at a lawful place and in a lawful manner. Said motion was overruled by the Court, to which ruling of the Court defendant, then and there, duly excepted.

The defendant offered no evidence, but rested.

The Government waived the opening argument; the defendant waived argument. Whereupon the Court instructed the jury. The jury, at the hour of 10:30 o’clock A. M. on the 6th day of November, 1924, to which date the court recessed, retired and brought in a verdict finding the defendant guilty as charged in the information.

The defendant, by his counsel, thereupon moved

the Court to arrest the judgment for the following reasons, to wit:

“That the information filed in this cause does not charge any public offense or any violation of law, in that it does not state that the possession of intoxicating liquors alleged was such possession as is prohibited by the National Prohibition Act and does not state the place of such alleged possession; because of which said errors in the record herein no lawful judgment can be rendered by the Court upon the record in this cause.”

Which said motion was denied by the Court, to which ruling of the Court the defendant, then and there, duly excepted.

Whereupon the Court continued the time for judgment and fixed same at 10 o'clock A. M., November 8, 1924.

BE IT FURTHER REMEMBERED, that on November 8, 1924, the Court entered judgment upon the verdict and sentenced the defendant to pay a fine of Five Hundred Dollars and in default of the payment of [21] the fine that he be imprisoned in the county jail of Maricopa County until the same is paid; to which verdict, ruling and judgment, the defendant, by his counsel, then and there, duly excepted on the ground that the evidence and the facts in this case do not support such verdict or judgment and that the information in the cause filed does not charge therein a public offense or a violation of the National Prohibition Laws of the United States,

and that the evidence is insufficient to warrant the verdict of the jury or the judgment of this Court.

And this was all the evidence taken and proceedings had on the above dates in the trial of the above-entitled cause.

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every particular and is hereby settled and allowed and made a part of the record in this cause.

Done in open court this 25th day of November, A. D. 1924.

[Seal]

F. C. JACOBS,
United States District Judge.

Rec'd copy of within this 19th day of November, 1924.

GEO. T. WILSON,
Asst. U. S. Attorney for Defendant in Error.

[Endorsed]: Filed Nov. 19, 1924. C. R. McFall,
Clerk. By Chas. H. Adams, Deputy Clerk. [22]

In the District Court of the United States for the
District of Arizona.

C.-No. 2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

PRAECIPE FOR TRANSCRIPT OF RECORD.

The Clerk of this court is hereby directed to prepare and certify a transcript of the record in the above-entitled case for the use of the Circuit Court of Appeals of the United States for the Ninth Circuit, by including therein the following:

Information.

Demurrer to information.

Motion to quash and set aside information.

Defendant's plea of "not guilty."

Verdict.

Defendant's motion in arrest of judgment.

Judgment and sentence.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Citation on writ of error.

Writ of error.

Reporter's transcript of evidence.

Bill of exceptions.

Praecipe for record.

Notice of filing praecipe.

Bail bond on writ of error.

Certificate of the Clerk to the correctness of the record, as per praecipe.

Order overruling demurrer of defendant to information and allowance of exception; and,

Order denying defendant's motion to quash and set aside the information and allowance of exception.

November 19, 1924.

F. L. ZIMMERMAN,
D. V. MULHERN,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Nov. 19, 1924. C. R. McFall,
Clerk. By Chas. H. Adams, Deputy Clerk. [23]

In the District Court of the United States for the
District of Arizona.

C-2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

NOTICE OF FILING PRAECIPE.

To Mr. George T. Wilson, Assistant United States
Attorney, for the Defendant in Error:

Please take notice that on the 19th day of November, 1924, the undersigned filed with the Clerk of this Court a praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, on writ of error sued out in the above cause, a copy of which praecipe is herewith served on you.

Dated this 19th day of November, 1924.

F. L. ZIMMERMAN,
D. V. MULHERN,
Attorneys for Plaintiff in Error.

Service of the within notice and copy of praecipe is hereby accepted this 19th day of November, 1924.

GEO. T. WILSON,

Asst. U. S. District Attorney for Defendant in Error.

[Endorsed]: Filed Nov. 19, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [24]

United States of America,
District of Arizona,—ss.

Ben Pasqualetti and Hugh R. Daggs, whose names are subscribed as sureties to the within bond, being severally duly sworn, each for himself, deposes and says: That he is a resident and householder within the District of Arizona; that he is worth the amount for which he becomes surety on said bond, over and above all debts and liabilities in unencumbered property situated within this District, exclusive of property exempt from execution and forced sale.

B. PASQUALETTI.

HUGH R. DAGGS.

Subscribed and sworn to before me this eighth day of November, 1924.

[Seal]

CHAS. H. ADAMS,

Deputy Clerk United States District Court for the District of Arizona.

[Endorsed]: Filed Nov. 8, 1924. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [25]

In the District Court of the United States for the
District of Arizona.

No. C-2161—PHOENIX.

THE UNITED STATES

vs.

B. S. NUNN.

BAIL BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:

That we, B. S. Nunn, as principal, and Ben Pasqualetti, and Hugh R. Daggs, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Seven Hundred Fifty & no/100 Dollars (\$750.00) to be paid to the United States of America, to which payment well and truly made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 8th of November, A. D. 1924.

WHEREAS, lately at the October term, A. D. 1924, of the District Court of the United States for the District of Arizona, in a writ depending in said court, between the United States of America, plaintiff, and B. S. Nunn, defendant, a judgment and sentence was rendered against said B. S. Nunn and the said B. S. Nunn has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and

sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, sixty days from and after the date of said citation, which citation has been fully served.

Now, the condition of said obligation is such, that if the said B. S. Nunn shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said court and prosecute his writ of error and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Ninth Circuit, in said cause, and shall pay any fine and costs imposed by the judgment of District Court against him, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed, or the writ of error or appeal is dismissed, and if he shall appear for trial in the District Court of the United States for the District of Arizona, Phoenix Division, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obli-

gation to be void; otherwise to remain in full force, virtue and effect.

B. S. NUNN.

B. PASQUALETTI.

HUGH R. DAGGS.

Approved by

F. C. JACOBS,

Judge.

November 8, 1924. [26]

In the United States District Court in and for the
District of Arizona.

No. C-2161—PHOENIX.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. S. NUNN,

Defendant.

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States, for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of United States of

America versus B. S. Nunn, said case being numbered Criminal 2161 on the docket of said court.

I further certify that the foregoing 26 pages, numbered from 1 to 26, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such clerk.

And I further certify that there is also annexed to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to Twelve and 45/100 Dollars (\$12.45), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and seal of said Court this 2d day of December, 1924.

[Seal] C. R. McFALL,
Clerk of the District Court of the United States,
for the District of Arizona.

By M. R. Malcolm,
Deputy Clerk. [27]

[Endorsed]: No. 4419. United States Circuit Court of Appeals for the Ninth Circuit. B. S. Nunn, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received December 4, 1924.

F. D. MONCKTON,
Clerk.

Filed December 5, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

B. S. NUNN,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

Brief of Plaintiff in Error

Upon Writ of Error to the United States
District Court of the District of Arizona

FILED
JAN 19 1925
F. D. MONKTON
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit

B. S. NUNN,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

Brief of Plaintiff in Error

Upon Writ of Error to the United States
District Court of the District of Arizona

In the United States Circuit Court of Appeals,
For the Ninth Circuit

No. 4419

APPELLANT'S BRIEF

B. S. NUNN,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

STATEMENT OF THE CASE

On the 30th day of August, 1924, four Police Officers of the City of Phoenix, in Maricopa County, State of Arizona, and Federal District in said State, armed with a search warrant issued by the Acting Police Judge of said city went to and entered the private dwelling house of B. S. Nunn, plaintiff in error here, with full knowledge that No. 1102 South Central Avenue, in said city of Phoenix so entered by them, was his private dwelling and occupied by him and his wife for that purpose only, their object being to search for intoxicating liquors.

On entering they found Nunn and his wife there but no one else. After reading the search warrant they proceeded to search the premises and found, under the bathroom and kitchen therein, two barrels and three bottles of very good whisky all of which the officers carried away to the Police Station in said city, one of the barrels was full and the other about

half full. Mr. Nunn was taken in custody and later turned over to the Federal authorities for prosecution.

Quite a few days after the raid the confiscated property was turned over to the National Prohibition Agents at Phoenix.

Thereafter, on the 20th of October, 1924, and after having been bound over to the District Court of the United States for the District of Arizona, plaintiff in error was informed against by George T. Wilson, Assistant United States Attorney for the District of Arizona, charging him with "violating Section 3, Title 2, Act of October 28, 1919, of the National Prohibition Act" in this to-wit; "wilfully and unlawfully possessing intoxicating liquor."

(T. R. pp. 1-3)

On the 22nd of October, 1924, and prior to arraignment, plaintiff in error demurred to the information because it did not state (a) that the alleged possession was, at a time and place where possession was, unlawful or illegal, (b) that the liquor was possessed in any particular place and, (c) that the liquor was possessed at a particular place other than a place where possession is lawful.

At the same time he moved to quash and set aside the information because the charges and facts therein set forth did not constitute a violation of law or a public offense, etc.

(T. R. pp. 4-5)

Thereafter, on the 25th of October, 1924, after argument on demurrer and motion to quash, the Honorable, F. C. Jacobs, Judge of the District Court of the

United States aforesaid, overruled the demurrer and denied the motion to quash.

(T. R. p. 7)

On the 5th of November, 1924, plaintiff in error appeared for arraignment before said District Court and plead "not guilty".

(T. R. p. 8)

On the 6th of November, 1924, plaintiff in error, having been tried by a jury and having rested his case without offering any evidence, was found guilty, whereupon on the 8th of November, 1924, judgment was pronounced upon him by the court and a fine of \$500 assessed.

Plaintiff in error was thereafter duly admitted to bail in the penal sum of \$750, which was furnished and approved by the court.

(T. R. pp. 33-35)

From the rulings of the said District Court on the demurrer to, and motion to quash, the information, on the admission of any evidence at all by the Government and from the judgment and verdict of the jury, B. S. Nunn brings writ of error in this court.

QUESTIONS INVOLVED

(1) Does the information in this case properly and sufficiently charge violation of the National Prohibition Act—"wilful and unlawful possession—" without alleging that the possession alleged was, at a time and place where possession was, unlawful or that the liquor was possessed at a particular place other than at a

place where such possession is lawful?

(2) Can conviction and judgment in a criminal case be had and sustained upon evidence tending to support an information charging merely "wilful and unlawful" possession of intoxicating liquor, in face of a motion to quash the information and, while the premises, where possession of liquor occurred, were possessor's private dwelling, occupied and used by him as such only?

(3) Is possession of intoxicating liquor in one's private dwelling, when occupied and used for that purpose only, unlawful under Sections 10138 $\frac{1}{2}$ aa and 10138 $\frac{1}{2}$ t, of U. S. Comp. Stat., 1923?

(4) If Congress exempted possession of intoxicating liquor, under Section 10138 $\frac{1}{2}$ t, in one's private dwelling while occupied and used by him as his dwelling, must a defendant in a criminal case who is charged with unlawful possession of liquor prove that such liquor was lawfully acquired or possessed by him when in his private dwelling or must the prosecution prove its case e. g., wilful and unlawful possession?

ASSIGNMENT OF ERROR No. 1

The court below erred in over-ruling demurrer to information because it does not state that the possession alleged was, at a time and place where possession was, unlawful or illegal and that the intoxicating liquor was possessed in any particular place and that said intoxicating liquor was possessed at a particular place other than a place where such possession is lawful. (T. R. p. 4)

ASSIGNMENT OF ERROR No. 2

The court below erred in denying motion to quash the information because the charge therein constitutes no violation of law in that it does not state that the intoxicating liquor was possessed at a place other than at one where possession is lawful but that, as a matter of fact, the intoxicating liquor was possessed in the private dwelling of Nunn occupied and used as such only. (T. R. p. 5)

ASSIGNMENT OF ERROR No. 3

The court below erred in admitting any evidence at all on behalf of the prosecution because, the information does not sufficiently charge any public offense or violation of the National Prohibition Act. (T. R. Bill Exc. p. 22)

ASSIGNMENT OF ERROR No. 4.

The court below erred in not directing the jury to return its verdict of "not guilty" because the evidence conclusively shows that the liquor was possessed in the private dwelling of plaintiff in error, while occupied and used by him for that purpose only and, because the information fails to charge and the evidence fails to show that the liquor so possessed by plaintiff in error in his private dwelling was possessed for an unlawful purpose and in an unlawful manner. (T. R. Bill Exc. p. 26)

ASSIGNMENT OF ERROR No. 5

The court below erred in denying the motion in

arrest of judgment because the information fails to charge any public offense or any violation of the National Prohibition Act in that it fails to charge that possession of intoxicating liquor as alleged was such possession as is prohibited by the Act and it fails to state the place of possession; that therefore, no evidence whatsoever should have been received and hence no conviction or judgment could be had and pronounced. (T. R. Bill Exc. p. 28)

ARGUMENT AND AUTHORITIES.

On Assignments of Error 1 and 2.

The first two assignments of error we shall, of necessity, consider together. Section 10138½ aa U. S. Comp. Stat. 1923, provides

“No person shall on or after *** manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, ***”

And Section 10138½ t, same Title, provides

“***But it shall not be unlawful to possess liquor in one’s private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.”

The first section above cited makes it unlawful to possess intoxicating liquor except as authorized. The authorization therefor and exception provided is found

in the last section cited; it does not make it unlawful to possess liquor in one's private dwelling while the same is occupied and used as such only, in spite of the fact that the Act is liberally construed toward the end that use of intoxicating liquor as a beverage may be prevented. This last section concludes

“And the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, or used.”

Clear reasoning tells us that possession of intoxicating liquor is first made unlawful by Congress.

But Congress has thrown around this law a safeguard against abuse of or misapplication to it by plainly protecting the hearth and home from violation by wrongful misinterpretation in that it shall not be unlawful to possess liquors in one's private home, when the place of keeping is occupied and used as a home only; and liquor so possessed in one's home need not be reported provided such liquor is kept there for (a) personal consumption of the possessor or owner of the home and his family residing there, or (b) for such owner's bona fide guests.

The undisputed facts disclosed, both at the preliminary hearing and at trial, and here by the bill of exceptions, dove-tail into the exception of the statute.

Attacking the information in this case filed the question “does it sufficiently charge a violation of Section 3, Title 2, Act Oct. 28, 1919, possessing intoxicating liquors wilfully and unlawfully”, arises. The information, stripped of all unnecessary verbage, charges “that Nunn, on or about the 30th of August, 1924, and within the Federal District of Arizona, did

wilfully and unlawfully possess intoxicating liquor, to-wit; about seventy five gallons of whiskey, which was then and there fit for use for beverage purposes, the said Nunn having no permit to possess same.” (T. R. p. 1-2)

As once stated the undisputed facts are that the liquor was possessed by Nunn in his private home while occupied and used by him and his family as such only. Under these facts the information was attacked be demurrer and motion to quash it. (T. R. p 4, 5)

We insist that the demurrer to and the motion to quash the information should have been sustained by the court below. (T. R. Bill Exc. p. 20-24 incl.)

Many of the United States District Courts have passed on these two assignments of error but no authority to fit the case at bar are we able to find by the Appellate Courts and this case is perhaps the first for consideration.

In *Hilt et al v. U. S.*, 279 Fed. p. 421, an indictment charged two counts, the second one was “unlawfully and knowingly possessing intoxicating liquors.” It was demurred to and also moved to be quashed because no facts were stated showing the alleged possession was accompanied by such purpose or intent, (unlawful and knowing) nor were facts stated therein that were, under the circumstances, such as would constitute a violation of law. The Circuit Court of Appeals held the indictment insufficient. Comparing the indictment in that case with the information and facts in the case at bar one finds it a much stronger case, in fact, in the *Hilt* case the court said that the facts averred are consistent with the alleged possession of intoxicating liquors being a legally permitted one.

In *Anderson v. U. S.*, 294 Fed. p. 593, the Circuit Court of Appeals, on page 596, states

“Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception (indictment), the pleader may safely omit any such references, as the matter contained in the exception is matter of defense and must be shown by the accused.”

So, in the Nunn case here the information should contain at least sufficient allegation showing the accused is not within the exception, or in other words, it should sufficiently show that he violated the law.

It is not at all difficult to plead so as to apprise this accused of the exact nature of the charge against him thereby furnishing him with the light to the law and it is unnecessary to plead in the information any negative averments or exceptions.

This court, in *Hockett et al v. U. S.*, 265 Fed. 588, and *Davis et al v. U. S.*, 274 Fed. 928, has held “indictment need not negative exception;” but the issues in those cases are wholly dissimilar to the issues in the case at bar as a careful analysis proves and therefore could have no application here. The language

of the section defining the offense contains an exception the ingredients of which could not be accurately and clearly described without omitting the exception in the information against Nunn; the facts here are that the whiskey was taken from a private dwelling, this the Government knew at and after the preliminary hearing, yet, with this knowlege it prosecuted Nunn for unlawful possession of liquor. (in his private home.)

Suppose, the information showed "unlawful possession at 1102 South Central Avenue, Phoenix, Arizona, the residence of Nunn, et cetera"; could such information maintain under the law in the face of demurrer and motion to quash it? This we conceive to be the real test. We do maintain that it could not stand; then, on this logic and reason; is the prosecution in this case not one contrary to the dignity, intent and spirit under Section 10138½ t? Again, is a rule which works one way only not a poor rule? Is the information in this case not a subterfuge or an attempt to evade the very statute by which Congress clearly intended to protect the private home from invasion and confiscation of property clearly permitted therein?

Attention is called to the fact, (T. R. Bill Exc. p. 20) that the search of and seizure in the home was by City Police Officers, who turned over and conveyed what they found and knew to the Prohibition Agents. Evidently the Police could not, successfully, or would not, prosecute Nunn and, the Prohibition Officers knowing this, accepted the evidence and used it and the Police Officers to make out a case, although let it be remembered, that the Federal Prohibition Agents could not obtain this evidence themselves except by

search warrant; it is also only too true that the Federal Agents could not procure such warrant by virtue of which a private dwelling may be searched except for probable cause in this to-wit; that they would first have to conclusively show and prove to a Federal official having authority to issue search warrants, that a sale or sales of whiskey are being made in that dwelling.

Under the facts in this case appearing as conclusive matters of record here the Federal Prohibition Agents could not obtain a search warrant at all, hence, they could not confiscate the whiskey and could not prosecute Nunn.

In the case of *Dukich v. U. S.*, 296 Fed. 692, this court held the information, attacked on demurrer, good and rightly so; that case also does not bear the slightest semblance to the case at bar because it was a case where "such possession of liquor" was prohibited, and the facts there showed that liquor was "kept" and sold at a place commonly known as a "soft drink resort"—a public place. Certainly, in that case the informer would not, and could not, as a matter of propriety to say the least, be required to plead defensive negative averments in the information.

Likewise, we refer to the case of *Millich et al v. U. S.*, 282. Fed. 604, also decided by this court in 1922. In it demurrers were interposed to the indictment charging in one count "unlawful possession of intoxicating liquor, et cetera." This case is also no guide for, nor does it fit, the case at bar because there was a possession of liquor in a cafe—a public place, similar to the facts in the *Dukich* case, *supra*. No issue on the facts, by motion to quash indictment, was raised.

In *Bell v. U. S.*, 285 Fed. 145, (C. C. A. 5th Cir.) the defendant was charged with transportation and unlawful possession of intoxicating liquors, the second count was for unlawful possession by information which charged "unlawfully possessing intoxicating liquors for beverage purposes, said possession not being for any of the reasons permitted in the Acts of Congress for lawful possession thereof and not being for sacramental, scientific, mechanical or medicinal purposes." The court held this information good because the plain and simple exceptions therein plead put the defendant upon ample notice of violation of the National Prohibition Act with which he was charged in this count. We think that without stating any technicalities or detailed specifications, the informer in the authority last cited plead clearly enough the exceptions to amplify a clear charge of violation of law. Let it be remembered that in that case the facts showed that the accused was not only a violator of the National Prohibition laws, but a continued violator thereof when he committed himself by saying, "well, I guess you have got me this time." We are convinced that the informer in the Nunn case could have plead a violation of law.

Following are a few of the reasonings of the many District Judges on the foregoing subject and special attention is called to "*U. S. v. Cleveland*, 281 Fed. 249," by reason of the sound and clear logic therein:

"*U. S. v. Descy*, 284 Fed. 724, reading from bottom of page 726;"

"*U. S. v. Illig*, 288 Fed. 939, reading from pages 942 (3), 943 (4, 5) and specially from page 945 (7, 8);"

“U. S. v. A. Quantity of Intoxicating Liquors, 289 Fed. 278, reading from pages 279, 280, and from top of page 281;”

“U. S. v. Boasberg, 283, Fed. 305, reading from top of page 307, page 311 (3), page 312 (4) and (5); 260 U. S. 756, 43 S. Crt. Rep. 246;” (this case was submitted on demurrers to and motions to quash two indictments which were the main contentions as in the case at bar.)

On Assignments of error Nos. 3, 4 & 5

These last three assignments of error will be considered together because of their close relation to each other under the facts and issues.

As has been submitted by argument and law cited in support of the insufficiency of the information in this case it follows as a matter of logic and common sense that no evidence whatsoever could become admissible, and if the charge of crime is insufficient there is no charge at all and the controversy ends there without further proceedings. There being no basis for any accusation of crime or violation of law by Nunn, none existed as the charge was timely and legally attacked by demurrer to and motion to quash the information. But one of two things could have been done, that is, the District Judge should have dismissed the information in this case by either sustaining the demurrer or by quashing the information.

This case should never have been allowed to go to the jury for consideration because the liquor was found unconcealed and properly in no place where it is unlawful to have it. No permit is required to keep liquor in one's home under conditions hereinbefore stated. If Congress had intended that liquor kept in

one's home should be reported or a permit sought for its keeping therein, then proper mandatory legislation to this effect would now appear on our statute books. Congress did exactly what it intended to do, that is, to permit one to have liquor in one's home for personal consumption and for entertainment of legitimate guests thereat. In no sense could Congress mean that a citizen of this great and freedom-loving republic should be compelled to prove his innocence when charged, in general and uncertain language, with unlawful possession of intoxicating liquor, under Section 10138½ aa, supra, when the evidence fails to support such charge but instead departs therefrom and properly supports a charge under Section 10138½ t of the National Prohibition Act, 1923, supra, on which no success could be hoped for at all.

Sacred and dear to all of us there still stands that great bulwark, ever above and supreme to congressional legislation upon the Volsted Act,—the constitution of the United States.—”

“No person shall be * * * compelled in any Criminal Case to be a witness against himself” * * *

Again analysing the evidence somewhat we can but conclude that the presumption of innocence strongly favors Nunn in that, the Government's evidence is silent as to any sale by him at his home or occupying and using his home for the purpose of maintaining a common nuisance therein; nor was his good whisky hidden by him, to the contrary, he kept it in the plain and proper place—in the little cellar under his bathroom and kitchen—; the natural presumption follows, nothing to the contrary being evident, that he kept it there for his convenience, personal consumption and

perhaps for the entertainment of any legitimate guests; certainly, he could not be presumed to engage in what is commonly known as "bootlegging" just because he had a barrel or two and three glass containers full of good whisky.

(Witness O'Hagan, Bill Exc. p. 25)

(Witness Kent, Bill Exc. p. 26)

It is said in "Singleton vs. U. S., 290 Fed. 130," (5th Circuit) by Judge Rose, (reading from page 131, 2,) that this court, in Panzich vs. U. S., 285 Fed. 871, said "that when liquors found, even in a private home, and the possessor has no permit for it, the burden of proof is on him to show it was kept for a lawful purpose." * * * In so far as the case at bar may be effected by the Singleton case we find it dicta and hence has no application to the Nunn case because a different set of facts exist there.

But, carefully analysing the authority referred to, we find the facts to be as follows; Panzich was charged with maintaining a common nuisance, by keeping, selling and bartering intoxicating liquors in violation of the National Prohibition Act; a number of automobiles continuously came to and stopped at Panzich's home and liquor was found in them; men were seen coming from the dwelling with liquor; a considerable quantity of liquor was found in that home on search. These facts, unlike the facts in the Nunn case, disclosed only too clearly that a private dwelling had lost its true identity and had assumed that of a common nuisance. There the accused were unclean and cunning in that, they wilfully imposed upon the very privileges granted them under Section 10138½ t, by converting their private home into what is commonly termed a bootleggers' joint.

This court properly quoted (reading from page 873) that * * * “any room, house, or place where intoxicating liquor is sold, kept, or bartered, in violation of the Act, is declared to be a common nuisance” * * * and * * * the possession of liquor (in a home) by a person not lawfully permitted to possess it (in the home) shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, or otherwise disposed of, in violation of the Act. This court goes on and holds that * * * “it becomes incumbent upon a defendant to prove that the liquor was lawfully possessed in the premises.” This latter phrase is important in that, the facts in the Nunn case show conclusively that he possessed his good whisky without any unlawful or conniving intent on his part, in his private dwelling; a place where it is lawful to have it.

After the District Judge heard the evidence adduced on the very fatal information in the case at bar, there was but one thing to do by way of correcting his error in over-ruling demurrer and motion to quash and that was to take the issues from the jury by directing it to find Nunn “not guilty” as charged.

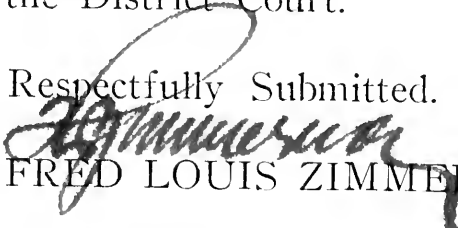
We earnestly press upon the court that the evidence offered by the Government and admitted by the lower court, in so far as it was intended to support the naked information in this case, failed in its purpose in that, it conclusively established the innocence of plaintiff in error. (Bill Exc. p. 20 T. R.)

The intent expressed in the information by the word “wilfully” and wholly unsupported by any evidence in this case, must therefore, also fall by the wayside and no legal conviction and judgment could be

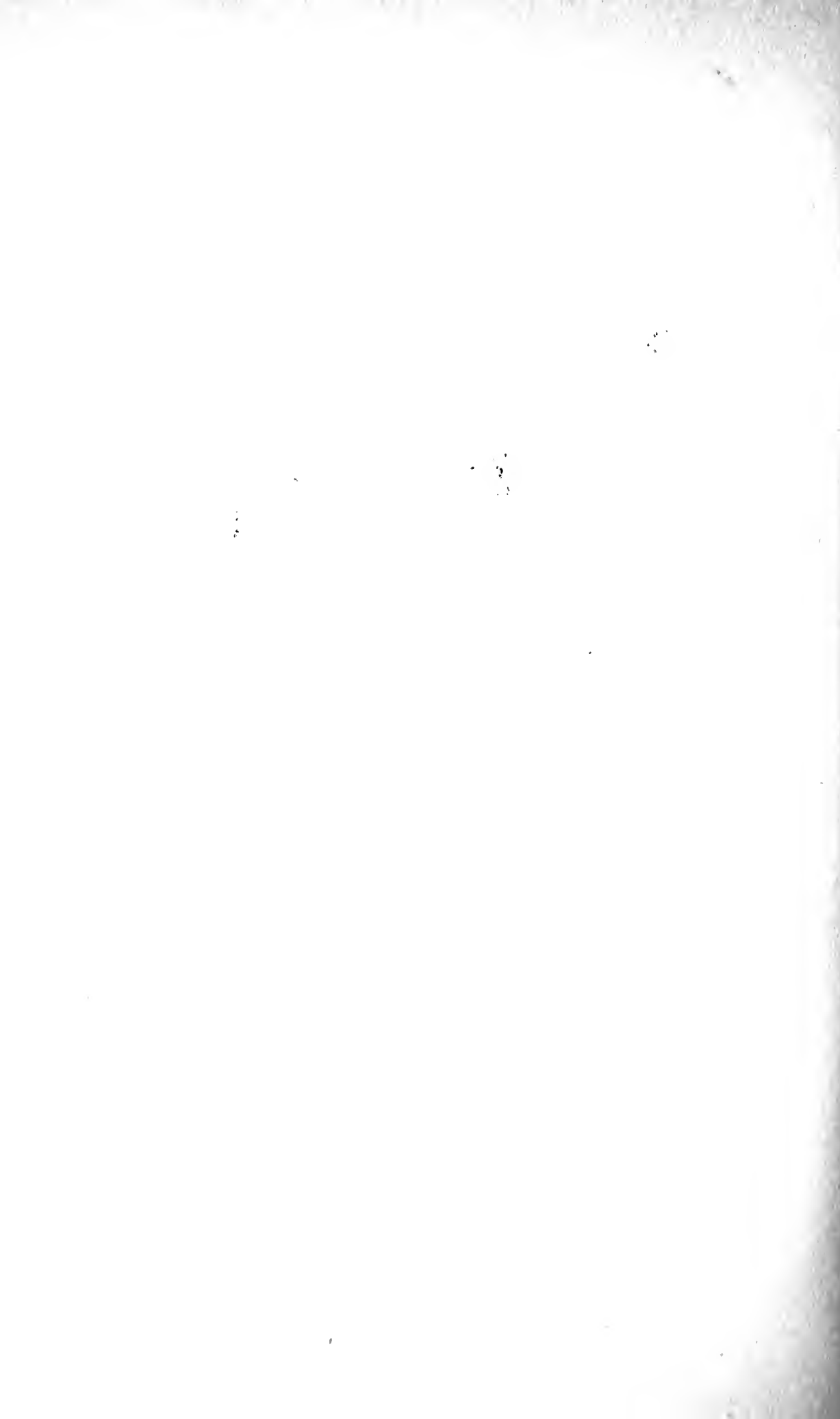
had and pronounced, nor could a valid sentence or punishment be imposed under the law, all the facts, circumstances, and issues of law involved.

Plaintiff in error sincerely prays for complete vindication ~~of~~ this court's reversal of the rulings, orders and judgment of the District Court.

Respectfully Submitted.


FRED LOUIS ZIMMERMAN,

Of ZIMMERMAN & MULHERN,
For Plaintiff in Error.



IN THE
**United States
Circuit Court of Appeals**
OF THE
Ninth Circuit

B. S. NUNN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 4419

Brief of Defendant in Error

Geo. T. Wilson,
Assistant United States Attorney,
For Defendant in Error.

Filed this.....day of February, 1925.

.....
Clerk, U. S. Circuit Court of Appeals.

IN THE
United States
Circuit Court of Appeals
OF THE
Ninth Circuit

B. S. NUNN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 4419

BRIEF OF DEFENDANT IN ERROR

ARGUMENT

In the brief filed by the plaintiff in error, there are five assignments of error all involving practically the same question. It is contended in each assignment that the information filed against the plaintiff in error in the District Court fails to state sufficient facts to constitute an offense under Section 3 of Title 2 of the National Prohibition Act, in

that it does not allege a time and place, when and where the possession of liquor was unlawful; and conversely, that the information fails to negative certain exceptions or defensive matters contained in Section 33 of the Act, namely, that the liquor in question was possessed by plaintiff in error in his private dwelling and intended for his personal use and that of his family and guests.

The exception contained in Section 33 of the National Prohibition Act and relied upon by plaintiff in error reads as follows:

“But it shall not be unlawful to possess liquors in one’s private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained therein; ***”.

It will be noted, however, that Section 33 contains another provision:

“*** and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used.”

This latter provision, read in connection with Section 32 of the Act, and both given their usual, ordinary and plain meaning, would appear to dis-

pose of this controversy, at least in so far as the statute itself is concerned. Section 32 provides in part:

“It shall not be necessary in any affidavit, information, or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, ***”.

At the trial of this case in the Court below the Government established the possession of seventy-five gallons of intoxicating liquor in plaintiff in error at the time and in the District named in the information. The evidence showed the exact place of possession to be his dwelling. The intoxicating liquor, after being qualified as such, was received in evidence, and the Government rested. (T. of R. pages 22-26). Plaintiff in error offered no defense, but rested. (T. of R. page 27).

It is patent that had plaintiff in error successfully established, as against the charge of unlawful possession of seventy five gallons of intoxicating liquor, that the liquor was lawfully acquired and possessed by him in his private dwelling and was intended solely for his own consumption and that of his family and guests, those facts would have constituted a complete defense. And by the provision of Section 33, above quoted, the burden of proving those very facts rested upon the plaintiff in error,

and the burden was not upon the Government in the first instance to negative or disprove them. In short, those facts are purely defensive matters, and as such, by the provisions of Section 32 it was not incumbent upon the Government to negative that defense in the information.

However, the exception contained in Section 33 is not the only one noted in the act. And, if the views of the plaintiff in error are to prevail, the rule of pleading he contends for would require the Government to negative every exception in the act, by the provision of which the possession of liquor is unlawful. When a person is charged with unlawful possession of liquor, he has available to him one or more of many defenses, any one of which, if successfully established, would defeat the Government's case. He may show, as against the charge of unlawful possession, a legal permit to possess the liquor, that such possession was in his dwelling and intended for the use of himself and that of his family and guests, that the liquor had been acquired and used for medicinal purposes, that he is conducting a bona fide hospital or sanitarium for the relief of alcoholism and the liquor was possessed and used solely for that purpose, or that he was a minister, priest or rabbi and as such possessed wine solely for the administration of the sacrament.

The possession of intoxicating liquor under any of these conditions and circumstances would be a

lawful one, and to follow the argument of plaintiff in error to its logical conclusion, it would be incumbent upon the Government in the first instance to negative every such condition and circumstance in its indictment or information, and to disprove the same upon the trial. Instead, then, of the simple pleadings and procedure provided by Sections 32 and 33, the indictment or information and the trial thereon would be a rather formidable affair. And, in our humble judgment, it was the intention of Congress, in enacting the provisions of those sections, and also of Section 3, to the effect that all the provisions of the act shall be liberally construed, to obviate that very contingency.

Even though Section 32 had been omitted from the National Prohibition Act, we are convinced that the general rule on pleading an exception, or proviso, contained in a criminal statute does not require the Government to go to the length in its indictment or information contended for by the plaintiff in error. Before discussing that rule, however, we desire to direct the Court's attention to the authorities cited by plaintiff in error in support of his position. With one or two exceptions, we do not believe he derives very much comfort from those decisions.

In the case of *Hilt vs. United States*, 279 Fed. 421, (Brief of plaintiff in error, page 8), the Circuit Court of Appeals for the Fifth Circuit reversed the ruling of the trial Court for failure of the

indictment, in any way, to show an unlawful possession. But it does not appear that the court's ruling was based upon failure of the indictment to include certain defensive negative averments. In a later case, however, *Powell et al vs. United States*, 294 Fed. 512, the same court explained and distinguished its decision in the former case, and held directly that it was not necessary to include in the indictment any defensive negative averments. The indictment in the latter case alleged that the liquor was intended for use for beverage purposes, while in the former case the indictment was entirely barren of any allegation indicating an unlawful possession. In the case at bar the information charges in part:

“*** Which said intoxicating liquor was then and there fit for use for beverage purposes, he, the said B. S. Nunn, then and there having no lawful permit to possess the said intoxicating liquor;***”.

These allegations, we submit, distinguishes the instant case from *Hilt vs. United States* and brings it within the decision in *Powell vs. United States*.

The rule for pleading an exception contained in a criminal statute, as set forth in the case of *Anderson vs. United States*, 294 Fed. 596, (Brief of plaintiff in error, page 9), will be the subject of further discussion in a later portion of this brief. Suffice to say at this point that it is the contention

of the Government that the case at bar comes squarely within the latter portion of that ruling.

Likewise, the cases of *Hockett et al vs. United States*, 265 Fed. 588; *Davis et al vs. United States*, 274 Fed. 928; *Dukich vs. United States*, 296 Fed. 692; *Singleton vs. United States*, 290 Fed. 130; and *Panzich vs. United States*, 285 Fed. 871, (Brief of plaintiff in error, pages 9, 11, 15), will be discussed more fully under our own authorities.

In the case of *Bell vs. United States*, 285 Fed. 145 cited by plaintiff in error, (Brief of plaintiff in error, page 12), it does not appear from the court's decision whether or not, in the opinion of the court, any less allegation than that set out in the indictment, would be sufficient. But assuming that it was the intention of the Court to say that the indictment or information by positive allegation must negative every exception noted in the statute, we are nevertheless convinced that the Court erred in applying that rule to pleadings under the prohibition act, that the weight of authority is to the contrary and that the rule as laid down in our own Ninth Circuit is the correct one.

While the case of *United States vs. Cleveland*, 281 Fed. 249, (Brief of plaintiff in error, page 12), appears to be squarely in point with the case at bar, we submit, that, however startling the learned judge's views may appear as expressed in that

decision, it loses entirely its force, erudition and authority when considered in connection with Singleton vs. United States, 290 Fed. 130, and Judge Rose's comment on it as expressed in the latter case.

The case of United States vs. Descy, 284 Fed. 724, has no application whatever to the case at bar. In that case, the only issue was the legality of the search of the defendant's premises raised by defendant's petition to suppress the evidence acquired by the search. The Court held that the question of the lawful or unlawful possession of the liquor seized was not involved, and properly so.

We agree with the decision in United States vs. Ellig, 288 Fed. 939, (Brief of plaintiff in error, page 12), wherein it is stated that something more than the bare conclusion of the pleader is required to give vitality to the pleading. In the instant case, the information sets forth the intended use of the liquor and also the possession thereof without permit (T. of R. page 2), hence, we doubt the application of that case to the one at bar. We are of the further opinion that that case is at war with the decision in Rulovitch vs. United States, 286 Fed. 315 decided by the Circuit Court of Appeals of the same circuit.

The case of the United States vs. A Quantity of Intoxicating Liquor, 289 Fed. 278 (Brief of plaintiff in error, page 13), is in the same category with

United States vs. Descy, 284 Fed. 724, and involves only the question of illegal seizure and hence has no application to the case at bar.

The case of United States vs. Boasberg, 283 Fed. 305, (Brief of plaintiff in error, page 13), in so far as it attempts to establish a rule of pleading applicable to the prohibition act, is contrary to the weight of authority on that question. This same case was submitted to the United States Supreme Court by the Government (260 U. S. 756), but unfortunately dismissed by that Court without any decision on the controverted questions.

The foregoing brief review of the decisions cited by plaintiff in error establishes that there are few, if any, really safe, competent and recognized authorities supporting his position. What authorities he has cited are in a hopeless minority, and in the light of long established and well recognized rules for pleading offenses denounced by our criminal statutes, do not express the law as we find it. The authorities submitted by the Government, we believe to be controlling, and these authorities we have attempted to follow in drawing our informations and indictments for offenses under the National Prohibition Act.

ANTHORITIES

The five assignments of error, involving, as they

do, practically the same question, will be considered together. That question, and the only one so far as we can gather from the Bill of Exceptions and the brief of plaintiff in error, involves the rule for pleading an exception in a criminal statute as applied to the information, drawn under Section 3 of Title 2 of the National Prohibition Act in the case at bar.

In *United States vs. Cook*, 84 U. S. 163; and again in *Anderson vs. United States*, 294 Fed. 593, the rule for pleading an exception noted in a criminal statute is announced, as follows:

“Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception, but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception (indictment), the pleader may safely omit any such references, as the matter contained in the exception is matter of defense and must be shown by the accused.”

This Court has had occasion several times to

apply this rule in cases coming before it involving statutes similar in their provisions and exceptions to the National Prohibition Act.

In *Shelp et al vs. United States*, 81 Fed. 694, 696, one of the questions presented to this Court was that the indictment failed to negative the exceptions contained in a statute reading in part as follows:

“*** and the importation, manufacture, and sale of intoxicating liquor in said district except for medicinal, mechanical and scientific purposes is hereby prohibited ***”.

In passing upon the sufficiency of that indictment, this Court remarked:

“The exception stated in the statute does not either define or qualify the offense created by the statute. The offense designated in the statute is the sale of intoxicating liquors in Alaska. This can be properly stated without any reference to the exception. There is nothing in the exception that enters into the offense condemned by the statute. The exception is purely a matter of defense, which, if relied upon, could readily have been proved by the defendants. A careful examination of the authorities will show that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged.”

See also *United States vs. Nelson*, 29 Fed. 202, 209 (D. C. Oregon); *Nelson vs. United States*, 30 Fed. 112, 116, (C. C. A. 9th Circuit).

The case of *Hockett et al vs. United States*, 265 Fed. 588, 590, (C. C. A. 9th Circuit), grew out of a violation of the Reed Amendment, which excepted from its operation shipments of liquor in interstate commerce for scientific, medicinal, sacramental and mechanical purposes. The indictment failed to negative the excepted portion of the statute, but this Court, following its earlier decision in *Shelp vs. United States*, (Supra) held that the exception need not be negated.

In the foregoing cases, it will be noted that the exception was included in the enacting clause of the statute in question. Yet, in each instance, this Court held the exception constituted no part of the definition of the offense. On the other hand, the prohibition act does not contain the exception in the defining portion of the statute, but merely words of reference thereto. (Section 3, Title 2, National Prohibition Act). This we believe to be additional reason for omitting from the indictment or information any reference to the exception; and this is apparently the view expressed by this Court in

Davis et al vs. United States, 274 Fed. 928, 929. Reading from page 929 of that decision, the Court said:

“That portion of the language of Section 3, which defines the offense which it was alleged in the indictment it was the purpose of the conspiracy to commit, is entirely separable from that portion thereof permitting the use of intoxicating liquor for non-beverage purposes. In addition to that fact, Section 3 declares that all the provisions of the act shall be liberally construed, to the end that use of intoxicating liquor as a beverage may be prevented, and Section 32 provides that it shall not be necessary in any indictment ‘to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful’. ***”.

In *Panzich et al vs. United States*, 285 Fed. 871, 873, this Court held the burden of proof rested upon the defendant to show that liquor found at his residence was lawfully acquired, possessed or used.

It is a favorite contention of plaintiff in error in this case that the information fails to show the liquor was possessed at any particular place. (T. of R., pages 4, 5). (Brief of plaintiff in error, pages 2, 3).

But in *Dukich vs. United States*, 296 Fed. 692, this Court held in effect, that it was not necessary to state in the information the place where the liquor was possessed, in view of the provision of Section 32 of the prohibition act, that it shall not

be necessary to include any defensive negative averments in the information.

Other Circuits have adopted and expressed the same views as this Court. Like this Court, they have refused to restrict the application of the plain terms of the prohibition act, as contended for by plaintiff in error in the instant case, and have given to the act the full force of its provisions as was undoubtedly intended by its framers.

In the Fourth Circuit, the Circuit Court of Appeals in two well considered decisions have held, that all the Government need show, in the first instance, is the mere possession in the accused, and that the burden then shifts to the accused to show a lawful possession.

Barker vs. United States, 289 Fed. 249.

Singleton vs. United States, 290 Fed. 130.

In Massey vs. United States, 281 Fed. 293, the Circuit Court of Appeals for the Eighth Circuit, likewise decided that it is not necessary in the information or indictment to negative the lawful purposes for which the accused might have possessed the liquor.

See also United States vs. Jones et al, 298 Fed. 131, 133 (D. C., Illinois, 7th Circuit.)

These decisions, in our opinion, amply sustain the validity of the information in the case at bar.

But we note in the brief of plaintiff in error (p. 14), that some criticism of the evidence adduced at his trial is offered, to the effect that the Government's evidence was entirely silent as to any fact inconsistent with a lawful possession of the liquor by him. This we dispute. While it is not contained in the Bill of Exceptions and consequently not in the Transcript of the Record, yet on pages 22, 23 of the Reporter's transcript of evidence, we find that the wife of the defendant was in the act of destroying one of the gallon bottles of liquor at the time the officers entered the house. And again, on page 15 of the Reporter's transcript, the evidence shows that the two large barrels of whiskey introduced in evidence were secreted immediately beneath the floor of the bath room and that access to them was gained by sliding a loose board of the bath room floor to one side. It appears from the evidence that this clever device was not readily discernible. In the opinion of plaintiff in error, apparently this evidence does not indicate a guilty knowledge of unlawful possession of liquor. While this may be so, it at least indicates an extreme self-consciousness of his possession of such a large quantity of liquor. Needless to say, both the Court and jury were well satisfied as to his guilt.

In closing this review of authorities on the question involved in this Writ of Error, we call the attention of this Court to the words of Judge Rose in *Singleton vs. United States*, 290 Fed. 130, 132, wherein he says:

“One who has become legally possessed of intoxicants may keep them in his dwelling. He may obtain a permit for them, but he is not required to do so; but, if the rightfulness of his having them is legally challenged, the burden is upon him to show that he lawfully obtained, keeps and uses them. There is nothing harsh or oppressive in such construction. He always knows how he procured the liquor and frequently no one else does **”.

To hold that the Government officers must be able to show, beyond a reasonable doubt, when and where the accused obtained the liquor, and its intended use, would be placing an obstacle in the path of enforcing this act that would completely defeat its purpose. No one, as the learned judge well said, knows better than the accused where and when he obtained the liquor, or the purpose for which he did obtain it; and no one is in a better position than he to enlighten the Court and the jury upon these facts. And when Congress placed upon the accused the burden of proving the lawful possession, it put into the hands of those charged with the enforcement of the act the means by which that result could be accomplished. The prohibition act in this provision does not differ materially from some other criminal statutes of our Federal Government, notably, the Narcotic Drug Acts and the Tariff Act. In the latter acts, all that is required to be shown by the Government, in order to establish a prima facie case, is the possession of the drug or of the merchandise in the accused, and the

burden of the evidence then shifts to accused to show a lawful possession.

In conclusion, we submit that the trial court did not err in any of its rulings affecting this case, that accused was granted a fair trial, that the evidence amply justified a verdict of guilty at the hands of the jury and that the judgment of conviction of the District Court should be affirmed.

Respectfully submitted

Geo. T. Wilson,
Assistant United States Attorney,
For Defendant in Error.

No. 4420

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN FIVE VOLUMES)

ANGELUS SANITARY CAN MACHINE COM-
PANY, a Corporation, and HENRY L.
GEUNTHER,

Appellants,

vs.

RAY O. WILSON, ARTHUR D. SUMNER,
FRANKLIN F. STETSON and LOS AN-
GELES CAN COMPANY, a Corporation,

Appellees.

VOLUME I.

(Pages 1 to 480, Inclusive.)

Upon Appeal from the United States District Court for the
Southern District of California, Southern Division.

FILED
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

For Appellants:

CHAS. E. TOWNSEND, Esq., and JAS. E.
KELBY, Esq., 909-917 Crocker Building,
San Francisco, California.

Messrs. LAWLER & DEGNAN, Esqs., 535 Van
Nuys Building, Los Angeles, California.

For Appellees:

RAYMOND IVES BLAKESLEE, Esq.,
727-30 California Building, Los Angeles,
California.

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Ray O. Wilson, Arthur D. Sumner, Franklin F. Stetson, and Los Angeles Can Company (a Corporation), GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Southern Division, wherein Angelus Sanitary Can Machine Company (a corporation), and Henry L. Guenther,—appel-

lants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, designated by the presiding Judge of the United States Circuit Court of Appeals for the Ninth Circuit to hear and determine the above-entitled cause, this 11th day of August, A. D. 1924.

JOHN S. PARTRIDGE,
United States District Judge.

Due service and receipt of a copy of the within citation on appeal admitted this — day of August, 1924.

_____,
Solicitors and Counsel for Plaintiffs-Appellees.
United States of America,—ss:

On this 12th day of August, in the year of our Lord one thousand nine hundred and twenty-four, personally appeared before me, Edward W. Brewer, Jr., the subscriber, and makes oath that he delivered a true copy of the within citation to Raymond I. Blakeslee on the said 12th day of August, 1924.

EDWARD W. BREWER, Jr.

Subscribed and sworn to before me at Los Angeles, Cal., this 12th day of August, A. D. 1924.

[Seal] PEARL M. STOUT,
Notary Public in and for the County of Los Angeles, State of California.

Filed Aug. 12, 1924.

In the United States District Court, Southern District of California, Southern Division.

IN EQUITY.

RAY O. WILSON, ARTHUR D. SUMNER,
FRANKLIN F. STETSON, and LOS ANGELES CAN COMPANY, a Corporation,
Plaintiffs,

vs.

ANGELUS SANITARY CAN MACHINE COMPANY, a Corporation, and HENRY L. GUENTHER,

Defendants.

BILL OF COMPLAINT.

For Infringement of U. S. Letters Patent Nos. 1,124,553, 1,203,295, 1,250,406, and 1,301,348.

To the Honorable, the Judges of the District Court of the United States, in and for the Ninth Circuit, Southern District of California, Southern Division:

Ray O. Wilson, Arthur D. Sumner and Franklin F. Stetson, all citizens of the United States and residents of Los Angeles, County of Los Angeles,

4 *Angelus Sanitary Can Machine Co. et al.*

State of California, and Los Angeles Can Company, a Corporation of California, having its principal place of business at Los Angeles, California, in said Southern District of California, Southern Division thereof, bring this their bill of complaint against Angelus Sanitary Can Machine Company, a corporation of California, having a place of business at said Los Angeles, California, in said Southern District of California, Southern Division thereof, and Henry L. Guenther, a citizen of the United States and a resident of said Los Angeles, California, in said Southern District of California, Southern Division thereof, and thereupon your orators complaining, show unto your Honors:

I.

That this is a cause of action based upon infringement of letters patent for inventions issued by the United States of America.

II.

That heretofore and prior to the 19th day of December, [1*] 1913, your orators Ray O. Wilson and Arthur D. Sumner, were the original, first and joint inventors of improvements in tools for Capping and Double-seaming Cans, not known or used by others before their invention or discovery thereof, or patented or described in any printed publication in the United States of America, or any foreign country before their invention or discovery thereof, or more than two years prior to their application for letters patent thereon, in the United States of America, and not in public use or on sale in the

*Page-number appearing at foot of page of original certified Transcript of Record.

United States of America, for more than two years prior to said application for letters patent therefor, and not abandoned, and not patented in any foreign country on an application filed more than twelve months prior to the filing of said application in the United States.

That your orators Ray O. Wilson and Arthur D. Sumner so being the original, joint and first inventors of said improvements in Tools for Capping and Double-Sealing Cans, to wit, on the 19th day of December, 1913, made application in writing in due form of law to the Commissioner of Patents, in accordance with the then existing laws in such case made and provided, and complied in all respects with the conditions and requirements of said law; that by an instrument in writing duly recorded in the United States Patent Office, your orators Ray O. Wilson and Arthur D. Sumner, assigned fifty-one hundredths of the right, title and interest in and to said invention and the letters patent to be issued thereon, to your orator Los Angeles Can Company; that thereafter such proceedings were duly and regularly had and taken in the matter of said applicaion, that, to wit, on the 12th day of January, 1915, letters patent of the United States No. 1,124,553 were duly and regularly granted, issued and delivered by the Government of the United States to your orators Ray O. Wilson and Arthur D. Sumner and Los Angeles Can Company, jointly, according to law, whereby was granted and secured to your orators Ray [2] O. Wilson and Arthur D. Sumner and Los Angeles Can Com-

pany, their heirs, legal representatives, successors and assigns, for the full term of seventeen (17) years from and after said 12th day of January, 1915, the joint and exclusive right, liberty and privilege, to make, use and vend the said invention throughout the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office, and duly signed by the acting United States Commissioner of Patents, he having full authority to sign the same, all as will more fully appear from said original letters patent, or duly certified copy thereof, which are ready in court to be produced by your orators; and that prior to the granting and issuance and delivery of said letters patent, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

III.

That heretofore and prior to the 10th day of August, 1914, your orators Ray O. Wilson and Arthur D. Sumner were the original, first and joint inventors of improvements in Can Heading Machines, not known or used by others before their invention or discovery thereof, or patented or described in any printed publication in the United States of America, or any foreign country before their invention or discovery thereof, or more than two years prior to their application for letters patent thereon, in the United States of America, and not in public use or on sale in the United States of

America, for more than two years prior to said application for letters patent therefor, and not abandoned, and not patented in any foreign country on an application filed more than twelve months prior to the filing of said application in the United States.

That your orators Ray O. Wilson and Arthur D. Sumner, so being the original, joint and first inventors of said improvements in Can Heading Machines, to wit, on the 10th day of [3] August, 1914, made application in writing in due form of law to the Commissioner of Patents, in accordance with the then existing laws in such case made and provided, and complied in all respects with the conditions and requirements of said law; that by an instrument in writing duly recorded in the United States Patent Office, your orators Ray O. Wilson and Arthur D. Sumner, did assign to your orator Ray O. Wilson and to your orator Arthur D. Sumner and to your orator Franklin F. Stetson, respectively, thirty one-hundredths, and thirty one-hundredths and forty one-hundredths, of the right, title and interest in and to said invention and any letters patent therefor; that thereafter such proceedings were duly and regularly had and taken in the matter of said application, that, to wit, on the 31st day of October, 1916, letters patent of the United States No. 1,203,295, were duly and regularly granted, issued and delivered by the Government of the United States to your orators Ray O. Wilson and Arthur D. Sumner and Franklin F.

Stetson, jointly, according to law, whereby there was granted and secured to your orators Ray O. Wilson and Arthur D. Sumner and Franklin F. Stetson, their heirs, legal representatives and assigns, for the full term of seventeen (17) years from and after said 31st day of October, 1916, the joint and exclusive right, liberty and privilege, to make, use and vend the said invention throughout the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office, and duly signed by the acting United States Commissioner of Patents, he having full authority to sign the same, all as will more fully appear from said original letters patent, or duly certified copy thereof, which are ready in court to be produced by your orators; and that prior to the granting and issuance and delivery of said letters patent, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions. [4]

IV.

That heretofore and prior to the 14th day of January, 1916, your orators Ray O. Wilson and Arthur D. Sumner were the original, first and joint inventors of improvements in Can-Top-Feeding Devices, not known or used by others before their invention or discovery thereof, or patented or described in any printed publication in the United States of America, or any foreign country before

their invention or discovery thereof, or more than two years prior to their application for letters patent thereon, in the United States of America, and not in public use or on sale in the United States of America, for more than two years prior to said application for letters patent therefor, and not abandoned, and not patented in any foreign country on an application filed more than twelve months prior to the filing of said application in the United States.

That your orators Ray O. Wilson and Arthur D. Sumner so being the original, joint and first inventors of said improvements in Can-Top-Feeding Devices, to wit, on the 14th day of January, 1916, made application in writing in due form of law to the Commissioner of Patents, in accordance with the then existing laws in such case made and provided, and complied in all respects with the conditions and requirements of said law; that by an instrument in writing duly recorded in the United States Patent Office, your orators Ray O. Wilson and Arthur D. Sumner, did assign unto your orator Franklin F. Stetson, forty one-hundredths of the right, title and interest in and to said invention, and in, to and under the letters patent to issue therefor; that thereafter such proceedings were duly and regularly had and taken in the matter of said application, that, to wit, on the 18th day of December, 1917, letters patent of the United States No. 1,250-406, were duly and regularly granted, issued and delivered by the Government of the United States to your orators Ray O. Wilson and Arthur D. Sum-

ner and Franklin F. Stetson, jointly, according to law, whereby there was granted and secured to your orators Ray O. Wilson and Arthur D. [5] Sumner and Franklin F. Stetson, their heirs, assigns and legal representatives, for the full term of seventeen (17) years from and after said 18th day of December, 1917, the joint and exclusive right, liberty and privilege, to make, use and vend the said invention throughout the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office, and duly signed by the acting United States Commissioner of Patents, he having full authority to sign the same, all as will more fully appear from said original letters patent, or duly certified copy thereof, which are ready in court to be produced by your orators; and that prior to the granting and issuance and delivery of said letters patent, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

V.

That heretofore and prior to the 14th day of January, 1916, your orators Ray O. Wilson and Arthur D. Sumner, were the original, first and joint inventors of improvements in Can-Feeding Devices, not known or used by others before their invention or discovery thereof, or patented or described in any printed publication in the United

States of America, or any foreign country before their invention or discovery thereof, or more than two years prior to their application for letters patent thereon, in the United States of America, and not in public use or on sale in the United States of America, for more than two years prior to said application for letters patent therefor, and not abandoned, and not patented in any foreign country on an application filed more than twelve months prior to the filing of said application in the United States.

That your orators Ray O. Wilson and Arthur D. Sumner so being the original joint and first inventors of said improvements in Can-Feeding Devices, to wit, on the 14th day of [6] January, 1916, made application in writing in due form of law to the Commissioner of Patents, in accordance with the then existing laws in such case made and provided, and complied in all respects with the conditions and requirements of said law; that by an instrument in writing, duly recorded in the United States Patent Office, your orators Ray O. Wilson and Arthur D. Sumner, did assign unto your orator Franklin F. Stetson forty one-hundredths of the right, title and interest in and to said invention, and in, to and under the letters patent to issue therefor; that thereafter such proceedings were duly and regularly had and taken in the matter of said application, that, to wit, on the 22d of April, 1919, letters patent of the United States No. 1,301,348, were duly and regularly granted, is-

sued and delivered by the Government of the United States to your orators Ray O. Wilson and Arthur D. Sumner and Franklin F. Stetson, jointly, according to law, whereby there was granted and secured to your orators Ray O. Wilson and Arthur D. Sumner and Franklin F. Stetson, their heirs, legal representatives and assigns, for the full term of seventeen (17) years from and after said 22d day of April, 1919, the joint and exclusive right, liberty and privilege, to make, use and vend the said invention throughout the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office, and duly signed by the acting United States Commissioner of Patents, he having full authority to sign the same, all as will more fully appear from said original letters patent, or duly certified copy thereof, which are ready in Court to be produced by your orators; and that prior to the granting and issuance and delivery of said letters patent, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

[7]

VI.

That the invention or inventions of each of said letters patent is or are capable of being conjointly used with the invention or inventions of each of the others of said letters patent, and has been or have been so conjointly used by defendants and each of defendants in infringement of said letters patent.

VII.

That the inventions set forth, described and claimed in and by said letters patent hereinbefore mentioned are of great value and have been extensively practiced by your orators; and upon each and every one of such machines, devices or tools disclosed and claimed in and by said letters patent aforesaid, and made or used by your orators, the word "Patented," together with the day and date of the issuance of said letters patent and each of the same, has been marked or stamped thereon, thereby notifying the public of the said letters patent to such extent as the public may have had access to the same; and that the said defendants long prior to the commencement of this suit have been notified in writing of the granting and issuance of each of said letters patent aforesaid, and of the rights of your orators thereunder, and demand has been made upon said defendants to respect the said letters patent and not to infringe thereon, but notwithstanding such notice, repeatedly made, the defendants have continued to make and use said machines, devices and tools embodying the said inventions of said letters patent aforesaid, as hereinafter more particularly set forth.

VIII.

And your orators further show to your Honors that the trade and public have generally respected and acquiesced in the validity and scope of said letters patent aforesaid and each of same, and in the exclusive rights thereunder of your orators and in the rights of your orators under which rights they

and each of same have practiced said inventions of said letters patent aforesaid; and save and except for the infringement thereof by defendants, as hereinafter set forth, and a possibly [8] limited number of other parties, your orators have had and enjoyed the exclusive right, liberty and privilege, since the date of issuance of each of said letters patent, of manufacturing, using and selling said machines, devices and tools, embodying and containing the inventions and each of same set forth and claimed in said letters patent aforesaid, and but for the wrongful and infringing acts of defendants, as hereinafter set forth, and said limited number of possible other parties, your orators would now continue to enjoy the said exclusive rights, and the same would be of great and incalculable benefit and advantage to your orators.

IX.

And your orators further show unto your Honors and allege upon information and belief, that notwithstanding the premises, but well knowing the same, and without license or consent of your orators or either of them, and in violation of said letters patent and each of same, and of your orators' rights thereunder, the defendants herein have, within the County of Los Angeles and State of California, and within the Southern District of California, Southern Division, aforesaid, and elsewhere, within the seven (7) years last past, jointly and severally and directly or contributorily, made, used and sold, and are now making, using and selling the tools, machines and devices and the like containing and em-

bracing the inventions and each of same, described, claimed and patented in and by each of said letters patent aforesaid, and have jointly and severally and directly or contributorily infringed upon the exclusive rights secured to your orators, Ray O. Wilson, Arthur D. Sumner, Franklin F. Stetson and Los Angeles Can Company, by virtue of said letters patent aforesaid and each of same, and continue to and now are jointly and severally and directly or contributorily infringing thereon, and that the tools, machines and devices and the like embodying said inventions so made, used and sold by the defendants and each of same, were and are infringements upon said aforesaid letters patent and each of same, of your orators Ray O. Wilson, [9] Arthur D. Sumner, Franklin F. Stetson and Los Angeles Can Company, and each of said machines, tools or devices or the like contains and has contained in it and embodies or practices and has embodied or practiced said patented inventions, and each of same; and that although requested so to do, the defendants and each of same have and has refused to cease and desist from the infringements aforesaid, and are now making, using and selling the tools, devices and machines and the like containing and embracing and embodying and practicing the said patented inventions and each of same, and threaten and threatens and intend and intends to continue so to do, and will continue so to do unless restrained by this court; and is and are realizing, as your orators are informed and believe, large gains, profits and advantages, the exact amount

of which is unknown to your orators; and that by reason of the premises and unlawful acts of the defendants aforesaid, your orators have suffered and are suffering great and irreparable injury and damage.

X.

That said defendant Henry L. Guenther has directed, promoted, devised and continued the said acts of infringement committed and performed both by said defendant Angelus Sanitary Can Machine Company and himself, and has personally and as an officer of said defendant Angelus Sanitary Can Machine Co., caused such acts of infringement aforesaid, and has joined in individual as well as official capacity with said defendant Angelus Sanitary Can Machine Company, in said infringement and infringements, as aforesaid.

XI.

That for all the reasons herein complained of, your orators have no plain, speedy or adequate remedy at law, and are without remedy, save in a court of equity, where matters of this kind are properly cognizable and relievable.

To the end, therefore, that the said defendants and each of the same may, if they can show why your orators should not have [10] the relief herein prayed, and may according to the best and utmost of their knowledge, recollection, information and belief, but not under oath (an answer under oath being hereby expressly waived), full, true and perfect answer make to all and singular the matters hereinabove charged, your orators Ray O. Wilson,

Arthur D. Sumner, Franklin F. Stetson and Los Angeles Can Company pray that the defendant may be decreed to account for and pay over to your orators Ray O. Wilson, Arthur D. Sumner, Franklin F. Stetson and Los Angeles Can Company, the gains and profits realized by the defendants and each of them, from and by reason of the infringement aforesaid, together with costs of suit.

And that the defendants may be decreed to account for and pay unto your orators the damages sustained by your orators by reason of such violation and infringement of your orators' rights, and that the defendants and each of them be restrained from any further violation of said rights.

Your orators pray that your Honors may grant a writ of injunction issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining said defendants Angelus Sanitary Can Machine Company and Henry L. Guenther, their attorneys, officers, agents, directors, workmen, servants, associates and representatives, and each and every of them, from any further manufacture or use or any sale in any manner, directly or indirectly or contributorily, of any of said inventions or any part or embodiment thereof, or the embodiment or practice of any part thereof, in violation of the rights of your orators Ray O. Wilson, Arthur D. Sumner, Franklin F. Stetson and Los Angeles Can Company, as aforesaid, and that the machines, tools and devices and the like now in the possession or use or under the control of said defendants may be destroyed under order

of this Court, and that your Honors upon rendering the decree above prayed, may assess or cause to be assessed in addition to the profits to be accounted for as aforesaid, the damages your orators have sustained by reason of such [11] infringement, and that your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendants as herein set forth; and that you orators may have such other and further relief as to your Honors may seem proper and meet and in accordance with the equity of the case and with good conscience.

May it please your Honors to grant unto your orators the writ of subpoena issued out of and under the seal of this court directed to the defendants Angelus Sanitary Can Machine Company, and Henry L. Guenther, commanding them on a day certain and under a certain penalty fixed by law, to be and appear before this Honorable Court then and there to answer this bill of complaint and to stand to and perform and abide by such further orders and decrees as to your Honors may seem meet in the premises.

And your orators will ever pray.

RAY O. WILSON.

ARTHUR D. SUMNER.

FRANKLIN F. STETSON.

LOS ANGELES CAN COMPANY.

By RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,

Solicitors and Counsel for Plaintiffs.

RAYMOND IVES BLAKESLEE,

J. CALVIN BROWN,

Solicitors and Counsel for Plaintiffs.

726-30 California Bldg., Los Angeles,
Cal.

Filed Dec. 6, 1921. [12]

[Title of Court and Cause.]

ANSWER.

Come now the defendants above named, and for answer to plaintiffs' bill of complaint, deny, admit and aver as follows:

I.

Defendants admit that this is a suit based upon alleged infringement of letters patent issued by the United States of America, but deny that said bill of complaint states a cause of action against these defendants or either of them and deny that the said letters patent, or any of them, are/is for a patentable invention.

II.

Answering Paragraphs II, III, IV and V, re-

spectively, of said bill of complaint, defendants admit that there have been issued the following letters patent specified in said Paragraphs, to wit: No. 1,124,553, No. 1,203,295, No. 1,250,406 and No. 1,301,348, issued, respectively, January 12th, 1915, October 31st, 1916, December 18th, 1917 and April 22d, 1919, but deny that said patents were legally granted to plaintiffs, or any of them, for the term of seventeen (17) years or for any term whatever; or that said patents, or [13] any of them, legally granted the joint or exclusive or any right of making, or using, or vending the alleged improvements or inventions referred to in said several letters patent sued upon, but that said letters patent, and each of them, are numbered, respectively, 1,124,553, 1,203,295, 1,250,406 and 1,301,348, and each and all of them, are invalid and of no effect; and further answering said Paragraphs II, III, IV and V of said bill of complaint defendants make the following denials, on information and belief, to wit:

(1) Deny that heretofore and prior to the respective dates alleged to wit, the 19th day of December, 1913, the 10th day of August, 1914, and the 14th day of January, 1916, or at any other time, or at all, Ray O. Wilson and Arthur D. Sumner, parties plaintiff in this action, were, or that either of them was, the original, first or/and joint or any inventors of Improvements in Tools for Capping and Double-Seaming Cans, Improvements in Can Heading Machines, Improvements in Can Top Feeding Devices and Improvements in Can Feed-

ing Devices, as set forth in Paragraphs II, III, IV and V of said bill of complaint.

(2) Deny that said inventions, and each of them, were not known or used by others prior to the 19th day of December, 1913, 10th day of August, 1914 and 14th day of January, 1916.

(3) Deny that said alleged inventions, and each of them, had not been patented or described in any printed publication in the United States of America, or any foreign country, before the alleged invention or discovery thereof by Ray O. Wilson and Arthur D. Sumner, parties plaintiff herein, or more than two years prior to their applications for United States letters patent thereon.
[14]

(4) Deny that said alleged inventions, and each of them, were not in public use or on sale in the United States for more than two years prior to said applications, and each of them, for letters patent therefor.

(5) Deny that said alleged inventions, and each of them, were not abandoned.

(6) Deny that said alleged inventions, and each of them, were not patented in any foreign country on applications filed more than twelve months prior to the filing of said applications, and each of them, in the United States.

Further answering said Paragraphs II, III, IV and V defendants aver, and so state the fact to be, that the alleged invention of patent No. 1,124,553 was not the joint invention of said patentees, Ray O. Wilson and Arthur D. Sumner, but was the

sole invention of said Ray O. Wilson; and that the alleged invention of patent No. 1,203,295 was not the joint invention of said patentees, Ray O. Wilson and Arthur D. Sumner, but was the sole invention of said Ray O. Wilson; and that the alleged invention of patent No. 1,250,406 was not the joint invention of said patentees, Ray O. Wilson and Arthur D. Sumner, but was the sole invention of said Ray O. Wilson; and that the alleged invention of patent No. 1,301,348 was not the joint invention of said patentees, Ray O. Wilson and Arthur D. Sumner, but was the sole invention of said Ray O. Wilson; and that said letters patent were fraudulently obtained as a consequence of said joint applications in each and every instance.

Further answering said Paragraph II said defendants are not advised, except by the bill of complaint, as to what interest, if any, the Los Angeles Can Company has in said [15] letters patent No. 1,124,553 and, therefore, deny that it has any interest therein and calls for strict proof thereof.

Further answering Paragraphs III, IV and V, defendants are not advised, except by the bill of complaint as to what interest, if any, the plaintiff, Franklin F. Stetson, has in patents No. 1,203,295, No. 1,250,406 and No. 1,301,348, or any of them, and, therefore, deny that he has any interest therein.

III.

Answering Paragraph VI of said bill of complaint, defendants deny, on information and belief, that the alleged invention or inventions of

each or any of said letters patent is or are capable of conjoint or any use with each or any of the others of said inventions, or have been, or has been, so conjointly or otherwise used by defendants, or either of them, in infringement of said alleged letters patent, or any of them.

IV.

Answering Paragraph VII of said bill of complaint, defendants deny that the inventions set forth, described and claimed in said alleged letters patent, and each of them, are of great or any value; and deny that plaintiffs have extensively practiced said inventions, or any of them, or placed same in public use or in any use; and defendants further deny, on information and belief, that upon each and every one of such machines there has been marked or stamped the word "Patented," together with the day and date of the issuance of said alleged letters patent, or any of them, but defendants admit that a short while before the bringing of this action defendants received what purported to be a written notice from plaintiffs in the tenor as alleged in Paragraph VII of the bill [16] of complaint; but defendants deny that they have ever infringed upon said letters patent, or any of them, or that they have any intention of infringing, or that they have made, or used, or sold any machines, devices or tools embodying the inventions of said letters patent aforesaid, or any of them; and defendants aver that the aforesaid notice of plaintiffs was solely for the purpose of attempting to intimidate defendants in their lawful pursuits of

business and in disregard of defendants' rights and in an attempt to injure defendants.

And defendants further show that immediately on receipt of said notice purported to come from plaintiffs, defendants, through their attorneys, requested of plaintiffs' attorney, that, in view of the very general charge of infringement and the fact that the patents were not only complex in their mechanical constructions but there were a vast number of claims contained in each of the four patents, investigation might be expedited if plaintiffs would point out any particular claims of any particular patent which plaintiffs might think these defendants infringed; and that despite the reasonableness of defendants' request, plaintiffs forthwith proceeded to file the present bill of complaint and have at no time stated, either in this bill of complaint or otherwise, what claims, if any, of any particular patent herein in suit are charged to be infringed.

V.

Answering Paragraph VIII of the bill of complaint, defendants deny that the trade or public has generally or at all respected or acquiesced in the validity or scope of said letters patent aforesaid, or any of them, or in any rights thereunder of plaintiffs, or any of them, and deny that [17] plaintiffs have ever practiced said inventions, or any of them, and deny that defendants have ever infringed said patents, or any of them; and defendants aver that if the plaintiffs, or any of them, have suffered any loss of trade or patronage it

has not been due to any infringement by these defendants but due to the superior quality of defendants' product and the fact that defendants' machines work on an entirely different principle from the alleged patented machines of plaintiffs.

VI.

Answering Paragraph IX of the bill of complaint, defendants deny that they, or either of them, have operated in violation of any alleged patent rights of said plaintiffs, or any of them, and deny that they have within the County of Los Angeles and State of California, and within the Southern District of California, Southern Division aforesaid or elsewhere, or within seven (7) years last past, or at any time, jointly or severally, directly, contributorily or otherwise made or used, or sold, or that they, or either of them, are now making, or using, or selling any tools or machines or devices containing or embracing the alleged inventions of said letters patent, or any of them, or claimed or patented in or by said letters patent, or any of them, and deny that they have, jointly or severally, directly or contributorily, or otherwise infringed upon the exclusive or any rights purporting to be secured to the plaintiffs, or any of them, by virtue of said letters patent aforesaid, or any of them; and defendants deny that they are continuing to or now are, jointly or severally, or directly or contributorily, or otherwise infringing thereon, and deny that the tools, machines or devices sold by defendants, or either of them, embody any of said alleged inventions of said pat-

ents in [18] suit; and deny that the same were or are infringements upon said letters patent in suit, or any of them, or any rights of plaintiffs, or any of them; and deny that said machines, or tools, or devices ever have contained or now contain or embody or practice, or have embodied or practiced the patented inventions, or any of them, and deny that they are threatening or intending to continue any infringement of any alleged patent rights of plaintiffs, or any of them; and defendants deny that the profits, if any, that they have derived from their business have not been entirely legitimate and that the profits, if any, are due to any alleged infringement of any alleged rights of the plaintiffs, or any of them; and, furthermore, defendants deny that they have committed any unlawful acts and deny that the plaintiffs, or any of them, have suffered or are suffering any great or irreparable injury or damages by reason of the acts of these defendants, or either of them.

VII.

In answer to Paragraph X of said bill of complaint defendant, Henry L. Guenther, admits that he is an officer of the defendant corporation, Angelus Sanitary Can Machine Company, but denies that he has directed, promoted, devised or continued, or countenanced any acts by himself individually or as an officer of said Angelus Sanitary Can Machine Company, in infringement of any rights lawfully secured to plaintiffs by said letters patent, and each of them.

VIII.

Without waiving any of the matters and things above set forth, but repeating and insisting upon the same, defendants further answering say: [19]

That said bill of complaint fails to state a cause of action against these defendants, or either of them:

(a) For that this Court has no jurisdiction to entertain a suit for any alleged infringement occurring more than six (6) years prior to the bringing of suit, whereas Paragraph IX of the bill of complaint alleged infringement "within the seven (7) years last past" (U. S. R. S., Section 4921).

(b) For that there is no allegation in the bill of complaint that the plaintiff, Los Angeles Can Company, was, either at the time of bringing the bill of complaint or during the said seven (7) year period, a corporation.

(c) For that the bill of complaint nowhere states that the said plaintiffs, or any of them, owned any interest in any of said letters patent in suit during the entire period for which damages and profits are demanded.

(d) For that the bill of complaint fails to specify any particular claims or any claims of any particular patent or any patent sued on as being infringed by these defendants, or either of them.

(e) For that the bill of complaint fails to set forth a cause of action for contributory infringement against either of these defendants.

IX.

For a further and particular defense defendants

allege that by Act of Congress of March 3d, 1897, Chapter 391, paragraph 6, 29 Stat. L. 694 (Section 4921, U. S. R. S.), the plaintiffs are prohibited from recovery of profits or damages for any infringement committed more than six (6) years before the filing of the bill of complaint herein. [20]

X.

And for a further and particular defense defendants aver that there is a misjoinder of parties plaintiff; and, further, that the bill of complaint fails to state a joint cause of action in favor of the several plaintiffs and against these defendants, or either of them, and for that it asserts that one group of plaintiffs owns one of the patents or any interest therein and another group of plaintiffs owns certain other of said patents or an interest therein.

XI.

And for a further and particular defense defendants are informed and believe, and so state the fact to be, that the said alleged inventions set forth in said letters patent Nos. 1,124,553, 1,203,295, 1,250,406 and/or 1,301,348, and each of them which are here in suit do not possess the quality of novelty nor of invention, and that said letters patent are, and each of them is, invalid in all respects for lack of patentable novelty and lack of invention.

XII.

And for a further and particular defense defendants state that Ray O. Wilson and Arthur D. Sumner, singly or jointly, was/were not the orig-

inal, or first, or joint, or any inventor or discoverer of any material or substantial part of the thing claimed as patented by said letters patent Nos. 1,124,553, 1,203,295, 1,250,406 and/or 1,301,348; and that said inventions, and each of them have/has been previously described and patented as hereinafter mentioned by printed publications and letters patent prior to the alleged invention or discovery thereof by said Arthur D. Sumner and Ray O. Wilson, or either of them, as follows, to wit:
[21]

Jensen—	443,445—December	23, 1890,
Walsh—	492,076—Feb.	21, 1893,
Smallwood—	523,013—July	17, 1894,
Austin—	532,518—January	15, 1895,
Adriance—	747,671—December	22, 1903,
Gillette—	770,803—Sept.	27, 1904,
Brenzinger—	813,482—February	27, 1906,
Wood—	830,551—Sept.	11, 1906,
Black—	858,785—July	2, 1907,
Wegner—	964,721—July	19, 1910,
Gray—	994,456—June	6, 1911,
Haight—	1,029,681—June	18, 1912,
Johnson—	1,074,325—Sept.	30, 1913,
Conradi—	1,077,393—November	4, 1913,
Nichols—	1,096,937—May	19, 1914,
Wagner—	1,104,751—July	21, 1914,
Miller—	1,106,884—August	11, 1914,
Woodland—	1,135,602—March	30, 1915,
Warme—	1,151,840—August	31, 1915,
Kruse—	1,152,188—August	31, 1915,

Woodland— 1,197,569—Sept. 5, 1916,

Woodland— 1,203,676—November 7, 1916,

Fleischer — 1,212,754—January 16, 1917,

and also others which are at this time unknown to these defendants, or either of them, but which defendants pray leave to set forth by amendment to this answer when discovered.

XIII.

Defendants further answering state, on information and belief, that prior to the dates of application for said [22] letters patent, and each of them, by Arthur D. Sumner and Ray O. Wilson, mechanical devices substantially identical with those of the patents in suit, and each of them, were and have been in public use and on sale in this country and were known to other persons, but whose names and addresses are unknown to defendants at this time but defendants pray leave to set forth by amendment to this answer said names and addresses when discovered.

XIV.

Defendants further show that plaintiffs have maliciously and without warrant or cause but with the purpose of injuring these defendants, and each of them, in their legitimate business committed slander of title to such business against these defendants, and either of them, in that plaintiffs have falsely represented or caused to be represented to the public at large and to prospective customers of defendants in particular that the machines and articles manufactured by these defendants under defendants' special designs and patents were or are in-

fringements upon plaintiffs' alleged rights under their said patents here in suit and by such wrongful acts of plaintiffs these defendants have suffered irreparable injury and damage and large pecuniary loss.

WHEREFORE, and for the reasons aforesaid, these defendants, and each of them, deny the equity of plaintiff's bill of complaint herein and all manner of wrongful and unlawful acts wherewith in the said bill of complaint these defendants, or either of them, are charged, and further denying the right of plaintiffs to the relief or any part thereof sought against these defendants, or either of them, in said bill of complaint, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct [23] and humbly pray to be hence dismissed with their reasonable costs on this behalf.

CHAS. E. TOWNSEND,

WM. A. LOFTUS,

Attorneys for Defendants.

JAMES E. KELBY,

Of Counsel.

Filed Feb. 11, 1922. [24]

[Title of Court and Cause.]

BILL OF PARTICULARS.

“* * * * *

(d) Patent No. 1,124,553, for Tool for Capping and Double-Seaming Cans, dated January 12, 1915,

no infringement charged by defendants of the claims of this patent.

* * * * *

Filed Jan. 6, 1922. [51]

[Title of Court and Cause.]

MASTER'S REPORT ON TRIAL OF PATENT
INFRINGEMENT SUIT.

This suit is for alleged infringement of three allied patents: (1) a can feeding device; (2) a can top feeding device; (3) a double seaming machine.

Nature of the Reference. The case was referred to the Master for trial. The reference is to hear and report, not to hear and determine. The report will therefore be more detailed and lengthy than otherwise.

It is a restricted reference which renders the report advisory in its character. Findings of the Master, however, under this order of reference, in my opinion, will be attended with that presumption of correctness than comes from the fact that all the witnesses whose evidence as taken have appeared before the trial officer, who has thus had the opportunity of judging their credibility, and more clearly understanding the meaning of their statements. The report may also be attended with a certain degree of persuasiveness by reason of the fact that the Master has twice visited the plant of the plaintiffs and watched the operation of their commercial device with the experts of both sides

in attendance explaining to him the various parts, functions and modes of operation thereof; and likewise visited the plant of defendant three times, with the same sort of explanations given him there; and also visited the plant of the American Can Company at Los Angeles in company with the parties, their attorneys and experts and there was shown and had explained to him other types of the same kind of machines.

The Hearing. In accordance with the order of reference [52] the case was called for hearing on Thursday, December 21, 1922, Raymond I. Blakeslee, Esq., of Messrs. Blakeslee and Brown of Los Angeles, California, appearing for plaintiffs and Charles E. Townsend, Esq., of San Francisco, California, appearing for the defendants, and with Messrs. Kelby & Lawson, attorneys of record, and thereafter the proofs of the parties were heard, adjournments being taken from time to time until September 6, 1923, when the case was submitted, and afterwards written briefs were filed and the case considered by the Master.

Master's Draft Report and Exceptions Thereto. On November 10, 1923, the Master concluded his draft report and submitted copies thereof to counsel for the parties. On December 4, 1923, plaintiffs filed their exceptions and suggestions in regard thereto which the Master immediately considered, making notes of what seemed proper to include in the final report. The following day the defendants submitted a paper entitled "Defendants' Objections to Draft Report of Special Master in Chan-

cery” and likewise “Defendants’ Requested Findings of Fact and Conclusions of Law Submitted to the Master after examination of the Draft Report.” All these papers have been carefully considered and additions, amendments and corrections have been made of the Draft Report, which report so changed is the Report now submitted.

The Evidence. A true transcript of the evidence and proceedings, together with comments and arguments of counsel made during the course of the proceedings, was taken stenographically by John P. Doyle and Ross Reynolds, Official reporters of this Court, and the same in thirty-eight pamphlet volumes of 3451 pages is herewith returned.

Exhibits. A large number of physical and documentary exhibits were also received in evidence and marked as set forth in the list of exhibits appearing in the general index with said pamphlet volumes of the evidence. These exhibits likewise are herewith separately returned. [53]

Motion to dismiss one party plaintiff. During the course of hearing, near the conclusion thereof, a motion was made to dismiss the Los Angeles Can Co., a corporation, as a party plaintiff on the ground that it was not a necessary party plaintiff, and it is recommended that said motion be granted.

Reserved Rulings. From time to time during the trial the Special Master, in cases of doubt, took occasion to reserve rulings on certain objections. I have carefully considered the oral testimony, the exhibits and written briefs of counsel and have formed my conclusions thereon. Much of the evi-

dence submitted is of small value in the final conclusion, but has been received in consonance with a broad scope of a hearing in equity. It is not worth while to go through the record and check over each case of a reserved ruling and decide each instance with care as to its inclusion or exclusion. It will save time and do no harm to either party if, as to my reserved rulings, the objection be now overruled, the evidence admitted and exceptions allowed to the party making the objection.

Patents alleged to be Infringed. The suit is one in the ordinary form seeking an injunction and an accounting arising out of claimed infringement of three letters patent.

Patent Exhibit 1. The first is for a can feeding device. The application was filed January 14, 1916, and patent issued April 22, 1919, No. 1,301,348 to Ray O. Wilson and Arthur D. Sumner, assignors of 40/100 to Franklin F. Stetson. The mechanism patented is adapted to receive, space, time and deliver cans over a disk with can engaging members reciprocating through slots therein to advance cans through a chute of curved rails over its face, and with various other features which will be discussed more in detail hereafter.

Patent Exhibit 2. The second patent is for a can-top feeding device. The application was filed January 14, 1916, [54] the same date as the can feeding device. The patent was issued December 18, 1917, No. 1,250,406, to Ray O. Wilson and Arthur D. Sumner of Los Angeles, California, assignors of 40/100 to Franklin F. Stetson of the

same place. The mechanism patented is adapted to receive cans from the can feeding device in depressions on the periphery of a disk which carry it around to the double seaming machine, the can tripping a finger in its passage so as to release a bottom cap from a stack of caps in a can-top rack, said bottom cap being engaged and advanced by a finger on the disk conveying it on a pair of rails directly above the can carried by the disk.

Patent Exhibit 3. The third patent is for a can heading machine or a double seamer. The application was filed August 10, 1914, about a year and a half prior to filing the two applications above described. The patent was issued October 31, 1916, No. 1,203,295 to Ray O. Wilson and Arthur D. Sumner of Los Angeles, California, assignors of 30/100 to said Wilson and 30/100 to said Sumner and 40/100 to Franklin F. Stetson of Los Angeles, California. These are the same parties to whom the other two above-named patents were issued and they are the parties plaintiff to this action.

The patent double seamer machine is adapted to receive cans and can tops simultaneously from the can top feeding device, and consists of a two turret machine with revoluble transfer means between. The first seaming operation is performed on the first turret and the rolling of the seam is accomplished on the second carriage. It is a continuously operating machine where several cans are operated on simultaneously, the first seaming operation being performed by encircling the can top with a seam

forming means and the second operation by rolling the seam against rollers.

Originally the complaint included also a patent for a tool for capping and double seaming cans, No. 1,124,553 which was subsequently withdrawn.

The defendants introduced said patent in evidence as their Exhibit V on April 4, 1923.

The Parties. It appears from the proofs that the plaintiffs, Ray O. Wilson, Arthur D. Sumner and F. F. Stetson, are [55] the owners of the patents which are alleged to be infringed.

The defendant Angelus Sanitary Can Machine Mfg. Co., is a corporation organized and existing under the laws of the State of California, and its codefendant Henry L. Guenther is its president and managing officer and is the inventor of patents which have been patented and which are claimed to infringe plaintiffs' devices, the defendant corporation being manufacturer thereof.

Defendant's Patents. The Guenther can feeding and timing device application was filed July 25, 1922, patent issued July 31, 1923, No. 1,463,527. His can cap feed application was filed December 21, 1921, and patent was issued May 8, 1923, No, 1,454,383. His can double seaming machine application was filed December 21, 1921, and patent issued January 2, 1923, No. 1,441,195. The first operation seaming head thereof has a separate patent issued therefor 1,450,418 issued April 3, 1923, and also the second operation seaming head thereof in patent 1,440,143 issued December 26, 1922.

Conjoint Use of Plaintiff's Patented Mechanisms. The three patent devices may be used as parts of one machine and are particularly adapted to pass cans and can tops on a line and in continuous motion from the time of their entry on to the can feeding device until discharged from the double seamer with the cans tightly sealed. The machine may be used either to put bottoms onto the can bodies or to seal the tops onto the cans filled with products of various kinds, such as apricots, beans, corn, fish, peaches, peas, tomatoes, spinach and other things suitable for canning.

The evidence shows that the inventions of said letters patent and the devices covered thereby are intended for conjoint use with each of the other of said inventions and with both of the others, and have been so used.

Similar devices have been conjointly used by the defendants. To some extent they have been so used in infringement of the third patent, as is herein elsewhere discussed.

In commenting on the visit of December 22, 1922, (T. 114) [56] to the Pacific Closing Machine Co. plant where plaintiffs' commercial structures are manufactured, the Master on January 4, 1923, describes his observations using notes made the day following the visit (T. 120-124, 135).

The commercial device manufactured under the three patents, known as the Pacific Machine, was explained by Mr. Webber, an employee of Pacific Closing Machine Company. It consists of three disks and two turrets with transfer means between

the turrets. The first disk is not a part of the patents. It is a revoluble disk with a center rubber wheel, the circumference of which is cut into four segments. This is a timing device for carrying cans onto the second disk. The second disk is the one of the first patent, the feeding disk. The feeding disk revolves at the same rate of speed as the first disk, and at the center of the feeding disk is a star wheel with four arms. The star wheel is located in the same place as the rubber wheel of patent one. The star wheel has a double function: First, if a can is fed too fast onto the feeding disk the outside curve on the rear of one of the arms retards the movement of the car forward; and second, if one of the cans comes in front of the tip of the star wheel it will accelerate its motion so as to have it come up in front of the timing device coming up through the slots in the floor of the disk. The timing device moves the can forward to the third disk, and there the can passes under a top feeding device. As it passes in the passageway it moves a finger which releases a cam wheel attached to a rod to operate a mechanism to allow a can top or cap to fall from the bottom of a stack, over the can. The can top proceeds above the can until the can is raised onto the chuck of the seaming machine proper in one of the turrets. At that point the top is down on the can and an encircling device begins to seam the can top flange with the can cap corresponding flange. In this first turret the can revolves on its vertical axis one and one fourth times while the turret makes a

partial revolution and it then is passed by a revoluble transfer means over a [57] transfer platform to a second turret where the chuck is revolved turning the can several times so that the seam is pressed against rollers while the turret also revolves carrying the can a part of the revolution to its point of discharge.

This second operation in plaintiff's patent contemplates a spinning of the can against rollers operating circumferentially to roll down the seam. This is the usual and ordinary way of all can closing machines of spinning the can rapidly, whilst rollers are pressed in to roll down and complete the seam on the second operation.

The mechanism considered as a whole and its general mode of operation, is, first, the can feeding disk with a track of parallel strips or rails and positive can engaging members which carry the can to a second disk or wheel with spaced apertures to receive same and pass it under the can top feeding device. It then goes to the first turret, where the first seaming operation is performed, and from there is passed to the second turret where the ironing of the seam is performed and it is then discharged.

On May 2, 1923, the Master visited the American Can Co. plant and commented on what he saw there, on the following day (T. 1764).

The party was shown through the plant and witnessed various operations in the seaming of cans and examined some of the can capping machines in storage and not operating, illustrative of the continuous operating machines, which have two rollers

in the seaming head, one to form the initial seam and the other to compress same and make the double seam. These were one turret machines and the can did not pass from one chuck to another nor from one platform to another, but remained on the same platform with the seaming rollers, performing successive operations. The party then proceeded to the shop of the Angelus Sanitary Can Machine Co., except Mr. Wilson, and there again observed the operations of the commercial seamer mechanism. [58]

(The above description of the Master's visit to the American Can Co. plant is taken, as above indicated, from the transcript, page 1764. Objection No. 18 of defendants' objections speaks of this portion of the Draft Report and that immediately following below as being a prejudiced and biased statement on the part of the Master. No objection whatever was offered at the time the statement was made on the record. The objection is without foundation.)

On the morning of June 2, 1923, the Master and party visited the plant of the Los Angeles Can Co., with which plaintiff Stetson is connected, and then went across the street to the Pacific Closing Machine Co. plant. In the afternoon of the same day he made a statement on the record of what he had observed (T. 3130-3147). At the Los Angeles Can Co. plant he examined the commercial machine under the plaintiffs' patent which had on the type of cap feed which had the finger on the disk which carries the cans and three blades which are operated

to allow a cap to fall onto the rails over the cap. The mechanism had a floor under the cap feed which raised gradually so as to bring the can a trifle above the floor of the chuck onto which it was delivered in the seaming machine. The whole floor was raised. There was not any rib or raised portion up off of the floor, the floor itself raised in that particular device. The can itself was held by the pockets perfectly vertical so that there was no tip at any time in going up this raised pathway. The finger on the disk engaged the can top immediately under the pile, that is, the can top had not passed forward in any respect but was engaged and moved forward by the finger on the disk. In revolving the first turret a mark was placed on the seaming ring and just beneath it another mark on the can itself. The can and the seaming ring where marked in the course of turning ceased to be coincident. The ring may be said to encircle the can top, in that the impingement thereof does proceed around the can cap and can top. The ring also physically encircles or surrounds the can cap and top, centering same. Defendants' counsel admits (T. 3154 11. 8-10) that the [59] ring encircles the can top not only physically but in operation in movement.

The party also observed a second machine which is in the line for commercial operation in putting bottoms on cans. The machine was speeded up and the Master's timing was 232 cans per minute with hardly any vibration. The machine was operated for a short time and then stopped and later started

again. This was partly due to the fact that there was not a sufficient supply of cans in the can feed chute to allow continuous operation in that high speed. Various tests were made of cans where the bottoms had been put on by plaintiffs' machine. The Master picked up other cans at random and had them tested. Some of them had only the first seaming operation completed when tested. With the first seaming operation only the can does not stand any pressure except perhaps four or five pounds. Two of the cans which had been so tested for the first roll were put back into the seaming machine and the second seaming operation was performed and on a test the indicator showed a pressure of twenty-five to thirty pounds. On the 2 $\frac{1}{2}$ pound cans the pressure ran up to thirty and on the gallon cans the indicator went up to 27 $\frac{1}{2}$ pounds. The same can was then taken back and the top was put on it. The top was then pierced and the can again tested on the bottom seam which showed 28 pounds pressure at that time. The air pressure was let in to the full extent. The internal air pressure test showed no leakage of air by bubbles from the cans visible in the test. The gallon can after the first operation did not hold any pressure at all. The fact that these cans do not hold air pressure when seamed with the first operation does not affect their ability to withstand pressure after the entire operation is completed.

At the Pacific Closing Machine Co. plant a new machine not yet fully completed was exhibited where the present commercial can feed was installed

without the star wheel on the second or feeding disk corresponding to the first disk in the first patent. The star wheel in the commercial machine is [60] located in the same place as the rubber wheel 22 of the patent and is exhibited in photograph in Exhibit X as marked D and there was no rubber wheel. Without the star wheel on the first disk A of the photograph Exhibit X the cans were timed by the wheel B so as to come onto the second disk C in advance of the radial ribs E. Later the star wheel was put in place and the tips of the star wheel extended into the path of travel of the cans about the same as the part 31 on the radial rib would extend if constructed according to the patent drawings, part 31 being inside and a relatively higher part. The cans came from the disk A onto the disk C and were retarded so as to revolve backward in their forward progress, a counter-clockwise direction. The star wheel advanced the cans until the radial ribs E came up through the slot in the disk C and they by reason of the can's eccentric course of travel the can was thereafter advanced solely by the ribs E until it was picked up by the pocket in disk G for passage under the can top rack. None of the cans were observed by the Master to come on top of the blades. The whole matter was apparently regulated by the adjustment of the disk A so that the timing center wheel of the disk A with the rubber pads B would time the cans to go onto the disk C always in front. If there was a failure of adjust-

ment of A then the cans would naturally come onto disk C in different positions.

The Master endeavored to notice particularly whether any of the cans on disk C would come directly over any uprising blades E but did not see any. The disk C is overlapped by the disk A but is adapted to receive cans near its center unless they come into contact with the tips of the star wheel.

In the cap feed mechanism there was a raised portion so as to lift the cans above the floor, similar to rail 74, patent No. 3. This raised portion likewise raised the cans so as to come slightly above the floor of the chuck to which it was delivered. This raised portion was broad enough so that a can could ascend on it easily. It did not seem to make any difference whether the rail was the whole width or [61] just a portion. Parts of the machine apart from it were examined, as for instance, the plate which contains the guide rail of the cap feed.

There was also examined a model of the can feed device with its arcuate rails to lead the cans into the center of the disk where it was contracted by a rubber wheel and retarded in its forward movement by the wheel acting in conjunction with the outer rail. Several cans were filled with water and run onto the first device, there being some spill. Whether this was due to the wooden chute which leads the cans onto this disk or to their striking the radial ribs was not clear. It seemed due to the unevenness with which they were delivered to the

disk rather than any interference with the ribs. There was probably $\frac{1}{8}$ of an inch step from the wooden chute onto the disk. Quite different from the level smooth delivery off of Disk A of exhibit photograph X onto the disk C. The wooden chute was apparently a makeshift proposition for the purpose of guiding the cans onto the disk. In the model the blades, corresponding to the blades 30 of patent 1, were beveled at the ends rather than having straight abutment and square edges seeming to appear in the patent drawing. That, however, even if true, would only be a variation of form not of great importance, there being no change in principle and the specifications not giving the exact shape. The modification is something that a mechanic should do if he found the edges too sharp or too straight and, in my opinion, he could modify it without departing from the spirit of the patent.

In the present commercial machines the cap is supported on the inner edge of the can receiving depressions in the periphery of the disk and on the outer edge on the fixed rail, instead of using two rails.

It has been conceded by the plaintiff that in his commercial machine he no longer uses two spaced rails in the form [62] in which they appear in his patent No. 2. Operating the model, cans, some of which were filled with water, were run through same and clear through the entire machine so as to be fully sealed showing that the model

was an operative device, and the model acted conjointly with the rest of the machine.

The Master also inspected the defendant's machines or devices a third time on September 5, 1923, just before the close of the case, and spent considerable time in watching it operate and noting the various details thereof.

Like the plaintiffs' machine, all three devices,—can feed, cap feed and double seamer,—were used conjointly in continuous operation, carrying smoothly a stream of cans from the can feed to the discharge in the double seamer.

Joint Invention. The special defenses raised by the answer that the inventions are the sole inventions of Ray O. Wilson are not sustained by the evidence but the evidence shows that they were the joint inventions of Ray O. Wilson and Arthur D. Sumner.

I find that the complaint states a joint cause of action.

Invention Shown. As to the defenses that the three letters patent in suit do not possess the quality of invention such contentions are contrary to the evidence. Each of these three letters patent possesses the quality of invention in varied degrees.

The can feeding patent is a short step in advance in a crowded art. It combines a revoluble disk with positive can engaging means and a chute across the face of the disk. No one of the prior art citations contains this combination.

The cap feed is also an advance in a crowded art, perhaps not of equal merit with the can feed

patent but entitled to consideration as an improvement. The combination of claim 1 is not contained in any one patent of the prior art, nor even suggested. Nevertheless it is a patent of narrow scope.

The double seaming machine, however, notwithstanding the art is crowded, is a distinct step in advance and an invention [63] of merit, and the patent is to be liberally construed.

Defendant has developed three similar devices which appear with the plaintiffs' devices in classifications by themselves in consideration of the prior art. By reason, however, of certain novel structural differences and differences in modes of operation in certain respects defendants have avoided infringement of patents 1 and 2, the can feed and cap feed patents.

With respect to the patent 3, the can seaming mechanism, while there are some detail differences as to the mode of operation and mechanical construction of certain parts considered by themselves, such as the seaming head shown in Exhibit "P" and the plaintiffs' curling ring used on the first turret, nevertheless as far as the question of infringement is concerned the general construction and mode of operation of these parts is the same as will hereinafter be described, and the essence of plaintiffs' invention and the general construction and mode of operation of the combinations covered by claims 2 and 4 of this patent the defendants have adopted, and have thereby become guilty of infringement.

The evidence shows the defendants Guenther and

his company defendant to be jointly and severally liable for the infringements found herein.

Novelty. As to the defenses that the patents are void, for want of novelty because of prior publication, these defenses are not sustained by the evidence but are contrary to the evidence. Each of the patents contains distinct novelty.

Utility. Each of the patents in suit possesses utility, both singly and in conjoint use, and each has actually been incorporated in structures commercially used.

Validity. I find each of the patents sued on is valid.

Notice of Patents. I find that the defendants were notified of the three patents in suit November 5, 1921 (T. 1004) [64] and had knowledge of Patent 3 in 1918, long before any infringement took place.

Each patent with its prior art will be considered separately below.

I.

THE CAN FEED PATENT.

Both the plaintiffs' can feed device and the Guenther can feeding and timing device belong to a distinct type where a disk is used in conjunction with positive can engaging members and a can chute consisting of guide rails passing over the surface of the disk.

Plaintiffs' patent can feed device consists of a horizontal revoluble disk with slots therein through which positive can engaging members raise and

engage the cans and carry them through guide rails with an arcuate path of travel around the center of the disk and from there off eccentrically to another can receiving member. In the center of the disk is a relatively small rubber wheel which acts in conjunction with the guide rails in retarding the cans to prevent jamming.

Plaintiffs' expert well classifies the prior art with relation to the means for moving the cans forward and testifies that one class uses a revoluble disk which has frictional engagement on the bottom of the cans to carry them forward on a certain line of travel through spaced rails; while another class uses positive engaging means such as star wheels, revolving arms, oscillating arms, moving belts and spiders of various sorts. None of the prior devices have in combination a disk and positive engaging means revolving therewith giving thereby in combination with the spaced rails and the retarding means a smoother progress.

In referring to the patents hereafter we will refer to the first and second bound volumes of patents giving the number of the patent, Volume I for Exhibit "Q-1" and Volume II for Exhibit "R-1." [65]

P. W. Fleischer, No. 1,212,754, Jan. 16, 1917, Vol. II, No. 27, has no revoluble disk but has a spider acting as a positive pusher to advance cans at an accelerating speed between a guide rail and the edge of a plate. No spacing means are shown in the patent.

Polk, No. 742,488, Oct. 27, 1903, Vol. II, No. 37, has a belt conveyor operating with a rotating disk and guide rails but has no positive can engaging members. It has no means on the disk for spacing the cans.

Levy, No. 1,159,848, Nov. 9, 1918, Vol. I, No. 36, shows the combination of a revolving can carrying disk, the cans being propelled by a pusher and engaging a diagonal guide to produce the effect of discharging cans at the peripheral speed of the disk. It does not have the guide rails, nor spacing means. The cans have no movement relative to the disk until deflected by arms shoving them off to a discharge chute.

Levey, No. 1,160,084, Nov. 9, 1915, Vol. I, No. 37, in a bottle capping machine has a revoluble disk carrying the bottles by disk friction through guide rails onto a second disk where they are picked up by a star wheel. It does not contain positive bottle engaging means operating with the disk, nor bottle spacing members associated with the disk.

Johnson, No. 1,106,222, Aug. 4, 1914, Vol. II, No. 44, is a disk friction mechanism containing a rotary disk with guide rails but no positive can engaging members, and no means to bring the can toward the center, nor spacing means.

Adriance and Calleson, No. 1,096,521, May 12, 1914, Vol. II, No. 45, is likewise a disk friction mechanism containing a rotary disk with guide rails, but no can engaging members, nor means to deflect cans toward the center, nor can spacing means on the disk.

Kruse, No. 1,152,188, Aug. 31, 1915, Vol. I, No. 33, has a rotary disk with the guide rails, the cans being carried by disk friction. This disk is not adapted to receive cans near its center nor are there any positive can engaging [66] elements, nor any spacing means for spacing them as advanced.

These are the references cited in the patent office. Other references are as follows:

Smallwood, No. 523,013, July 17, 1894, Vol. II, No. 20, for a bottle filling machine contains a positive pusher and probably an accelerating movement of the bottle but does not resemble plaintiffs' device in mechanism or mode of operation. It has no rotary disk adapted to receive bottles near its center.

Woodland, No. 1,133,602, March 30, 1915, Vol. II, No. 21, contains a feed conveyor carrying a series of containers to a disk and prior to a time these containers are delivered onto the disk they are spaced relative to each other and in synchronism with receiving pockets on the disk. The initial conveyor is an endless belt. It has no rotary disk adapted to receive cans near its center but has a positive engaging means and guide rails at the place of discharge.

Austin, No. 532,518, Jan. 15, 1895, Vol. II, No. 22. This consists of a rotary table with can pockets on top, cans are guided to the table by guide rails. It has no continuously revoluble conveyor shown to which cans are delivered when discharged from the table. The table is not adapted to receive cans

near its center and there are no means for separating the cans relative to each other.

Haight, No. 1,029,681, June 18, 1912, Vol. II, No. 23. This patent shows a belt conveyor to deliver cans to star wheel feed. It does not have a rotating disk adapted to receive cans near its center, nor has it any deflecting means. The spacing means are on the endless belt.

Miller, No. 1,106,884, Aug. 11, 1914, Vol. II, No. 24. Figure 1 shows the plan view of a bottle-feeding machine. The bottle carrier conveys the bottles to an intermittently movable carrier. The rotary disk 66 receives the bottles from the filling table. It has guide rails 80 and 90. Frictional engagement with the disk moves the bottles. The retarding means is an arm at the entrance of the bottle-receiving mechanism. It has no continuously movable conveyor of equal speed with the disk. [67]

Woodland, No. 1,197,569, Sept. 5, 1916, Vol II, No. 25. This is also a bottle-feeding mechanism. Figure 2 is similar to Woodland above mentioned, Vol. II, No. 21. It has a rotary table 12 with bottle-receiving members 14. The table is not adapted to receive bottles near its center. There are spaced rails 29 and 30 at the end of the path of travel for deflecting the bottles outwardly.

Woodland, No. 1,203,676, Nov, 7, 1916, Vol. II, No. 26, is another bottle-feeding mechanism similar to Woodland just described. It has a rotary table 12 with bottle-receiving members 14. Bottles are fed to it by an endless belt conveyor and arm 42. Bottles are discharged between guide rails on to a

friction disk to a discharge conveyor. The retarding means are element 60 an arm projecting into the path of travel at that part of the guide way where the bottle enters therein.

Jensen, No. 443,445, Dec. 23, 1890, Vol. II, No. 4. The feeding mechanism of this seaming machine patent has a disk carrying cans forward by frictional engagement but the disk is not adapted to receive cans near its center, nor does it deliver same directly to a rotating receiving disk.

The patents above mentioned while not all discussed are sufficient to illustrate the various types of machines shown in the prior art.

One feature of novelty (a part of the novelty of the combination itself) in the various combinations of a number of claims is the plurality of can engaging members operated by a cam causing said members to advance and recede and on advancement to come into engagement with the cans and forward them to the succeeding can-receiving mechanism.

The prior art shows no mechanism which has, as described in claim 1, can engaging members operating through slots in a disk; nor, as described in claims 2 and 3, members *reciproacting* through the rotary member to engage behind the can; nor, as described in claims 4 and 5, vertically moving can engaging members carried by the disk with means operating on [68] the rotation of the disk to raise and lower the can engaging members; nor, as described in claim 7, vertically movable radi-

ally extending members carried by the disk adapted to engage the cans with means for raising and lowering the can engaging members; nor, as described in claim 8 radial ribs associated with a rotating support and movable therewith; nor, as described in claim 10, means movable to points above and below the surface of the disk for engaging the rear sides of the cans when on the outer part of the disk.

Another feature of novelty in this can feeding patent is the retarding means,—a rubber wheel of relatively small diameter to that of the disk, in the center of which disk said wheel is placed, the rubber wheel operating in combination with the outer curved rail to retard the cans until they are positively engaged by the can-engaging member and also assisting the inner raised portion of the engaging member to operate to space the cans in their progress.

These retarding means appear in claim 2 as “a rubber wheel upon the shaft and having its periphery extending into the can chute”; in claim 3, “a can chute leading over the face of the disk and part way round the shaft, a rubber wheel mounted upon the shaft and extending into the chute”; in claims 4 “means for guiding the cans across said disk and means for regulating feed of the cans to the can engaging members”; in claim 5 “means for yielding the cans across said disk, and means for regulating the feed of the cans to the can engaging members, comprising a friction roller mounted to rotate with said disk positioned to engage the cans be-

fore the latter are engaged by the advancing members and press the cans against the outer side of the guide means"; in claim 6 "a horizontal guide chute extending across one of the feed disks, a friction roller concentric to the last-mentioned disk mounted to rotate therewith, co-operating with the guide chute to engage the cans in the latter and limit the speed of their advance"; claim 7 uses the same language as claim 6, except the friction roller is described [69] as "mounted to rotate in unison therewith" (the disk); claim 8, "stationary guides disposed eccentrically relative to axis of rotation of said support for moving articles radially and for retarding the forward movement thereof for placing the articles in contact with the radial ribs"; claim 9, "a rotating disk of relatively large diameter and adapted to receive cans near its center."

Claims found valid. Claims 1 and 10 are found valid because containing the first above described element of novelty with respect to the can engaging members, and because the combinations themselves are novel.

Claim 6 is found valid. It contains the novel retarding means and the combinations are novel. Claims 2, 3, 4, 5, 7, 8 and 9 are found valid. They contain both elements of novelty, the positive engaging means and retarding means, and the combinations are novel.

Other elements of novelty appear in the several claims, but need not be discussed as there are sufficient to sustain the novelty of the invention as

claimed in the several combination claims of plaintiffs' patent.

Prior art structures show in various combinations:

(1) A disk revolving to carry the cans.

(2) A chute or curved rails across the supporting surface.

(3) Can engaging members to produce the forward movement of the cans.

(4) Retarding means to allow spacing members to separate the cans and permit the positive engaging members to come into operative position behind the cans.

None of the prior art structures have in combination a relatively large disk adapted to receive cans near its center, nor do any of them have a rubber wheel to retard the movement of the cans, nor do any combinations of the prior art include cam operated radial ribs, fingers or bars.

The essence of the inventions covered by the claims of plaintiffs' patent are the means for the gradual smooth movement [70] of the cans across the surface of the disk to be engaged without stop, jar or jerk by a second disk with means to carry the cans further.

These first-mentioned means for retarding the cans are, as stated above, the arcuate guide rails carrying the cans into position near the center of the disk where they come into engagement with the friction roller and are spaced by the tips of members rotating with the disk and are advanced

by the radial ribs coming into engagement behind the cans.

As to Invention.—The granting of the claims by the Patent Office raises a presumption in favor of invention.

So also the proven utility and advantage of the cam operating fingers or radial ribs which advance and recede into and from the chute or arcuate rails which guide the cans across the face of the revolving disk, further strengthen the conclusion that the device is the result of invention.

The prior art shows disks carrying cans through arcuate rails and other devices with positively operated members carrying the cans through arcuate rails on tables. This presumption as to invention is not destroyed by the theory that it would require merely mechanical skill to combine the disk with the positive engaging members because in the plaintiffs' device we have new combinations containing other elements of novelty and as producing a new and useful result, the smooth and continuous flow of cans without spill of liquid contents.

By reason of the fact that the prior art is crowded, the invention is necessarily of narrow scope and in determining equivalents or non-equivalents of elements the scope of the patent must be borne in mind.

Non-Infringement.—The defendants' device stands in the same class as that of the plaintiffs' device, in that we have cam operated fingers for positively engaging and forwarding the can

through arcuate guide rails with a revolving disk to support them.

Defendants' machines and each thereof contains or contain [71] can feed mechanism comprising a revoluble member over which cans are passed in substantial proximity to the center thereof and discharged from the periphery thereof where they are received by can engaging elements of a rotating member which picks up the cans at the speed of delivery, together with means rotatable in conjunction with the disk, and mechanically operated, for positively moving the cans while they are supported upon the revoluble member and while said latter member is moved, and for causing the cans to so move in spaced relation and sequence.

The cans in both plaintiffs' and defendants' devices are given the same axial movement on retardation and held back for engagement by a subsequent mechanically operated member disposed in operation above the surface of the disk.

The can operated fingers of the defendants' device are above the surface of the disk and do not operate vertically, except incidentally, their movement being practically horizontal. These fingers do not come up through slots in the disk.

Claim 1 is not infringed because it does not have "a series of radial slots formed therethrough" (the disk), nor do the can engaging members operate through slots, nor do they have vertically extending inner portions, nor is any part thereof below the surface of the rotatable disk.

Claim 2 is not infringed because the defendants' device has no "rubber wheel upon the shaft and having its periphery extending into the can chute," nor does it have members "reciprocating through the rotary member to engage behind a separated can."

Claim 3 is not infringed for the same reasons. It has no "rubber wheel mounted upon the shaft and extending into the chute" nor does it have "members reciprocating through the rotary disk to engage behind the separated cans."

Claim 4 is not infringed because defendants' device has no "vertical moveable can engaging members carried by said disk" nor "means operating on the rotation of said disk to raise and lower said can engaging members." [72]

Defendants' can engaging members are not carried by the disk but are carried on the shaft which rotates the disk.

Claim 5 is not infringed because there is lacking in defendants' device the "vertically moveable can engaging members carried by said disk," and "means operating on the rotation of said disk to raise and lower said can engaging members," nor is there in defendants' device the "friction roller mounted to rotate with said disk."

Claim 6 is not infringed because it does not contain "a friction roller concentric with the last-mentioned disk (the disk delivering cans to the can top feeder) mounted to rotate in unison therewith." The defendants' device has yieldable cushioning means the can engaging fingers (with springs),

which co-operate with the guide chute to engage cans in the latter and regulate the speed of their advance. Moreover, the element of Claim 6 "means for rotation said disk at corresponding peripheral speed" is not in defendants' device which has two disks operating at different rates of speed.

Claim 7 is not infringed because the defendants' structure lacks the following elements of claim 7, to wit: "means for rotating said disks at corresponding peripheral speeds," and "a friction roller concentric with the last-mentioned disk mounted to rotate in unison therewith"; nor does it have "a plurality of vertically moveable radially extending members carried by said last-named disk adapted to engage the cans before they are released by the friction member," nor "means for raising and lowering the can engaging means."

Claim 8 is not infringed because defendants' device does not contain the element described in the claim as follows: "stationary guides disposed eccentrically relative to axis of rotation of the support for moving the articles radially." The guide rails direct the cans into the pockets of the next disk. The guide rails also in conjunction with the engaging fingers of defendants' device may retard the forward movement of the cans but do not do so by moving them toward the center of the disk, nor does the retardation place "the articles in contact with radial ribs." [73]

Claim 9 is not infringed because it does not include the element "a rotating disk of relatively large diameter and adapted to receive cans near its

center.” The size of defendants’ disk is unimportant except that it must be large enough to receive cans thereon. Defendants’ disk is not adapted to receive cans near its center in the sense that that language is used in the claim. The fingers in defendants’ device prevent the cans coming near the center for the purpose of retardation of their movement. The path of the travel of the cans in defendants’ device is not toward the center where they become engaged by the radial ribs nor from there are the cans accelerated by being deflected away from the center out to the periphery of the disk but this is done by the accelerating movement of the fingers.

In defendants’ can feed mechanism the outer rail is differently positioned with cans of different diameters. The position or path of the outer rail has no function different when used with smaller than when used with larger cans. In other words, the fact that the smaller cans come in further from the edge of the disk brings them no closer to the center thereof, but they are just as far from the center as the larger cans are.

Claim 10 is not infringed because it does not have “means moveable to points above and below the surface of the disk for engaging the rear sides of the cans * * .”

Defendants’ structure so departs from the invention covered by the claims of plaintiffs’ patent that it is not the same in detail nor substance. It is true that both parties’ devices may be properly placed in the same classification—a new classifica-

tion—different from the classes existing in the prior art, in that they show the combination with a rotary disk of mechanically operated means moveably mounted to be brought into position to space the cans. An essential feature of plaintiffs' invention is the synchronous movement of the can engaging members with the disk thereby permitting the can engaging members to rise through slots in the disk to engage the cans. But in defendants' device the can engaging [74] members have a separate gear from that rotating the disk and these members move at a greater speed than the disk. Moreover, they have an accelerating tendency due to the lateral movement of the arms as the cans progress. It is true that these arms rise and fall but this is not an operative feature and is merely incidental to the lateral movement of the arms and fingers of defendants' structure.

The change in plaintiffs' commercial device, whereby the rubber wheel is replaced by a star wheel and an independent timing device has been adopted, consisting of a four-segment rubber wheel on a separate feeding disk, is significant in connection with consideration of the question of equivalents of the resilient feature of defendants' can engaging fingers.

These changes are persuasive that the details of defendants' structure for retardation and spacing of cans has not been pirated by defendants, that the defendants' means are not the mechanical equivalent of plaintiffs' means. The mode of operation of plaintiffs' new commercial parts and the mode of

operation of the defendants' retarding means both differ from the patent.

The defendants' can engaging fingers are wedge shaped to push in between two cans, carrying forward the front can and pushing the one in the rear, if too close, against the other rail, causing it to turn clockwise. The results are the same as provided for in the patent, but are not obtained in the same way.

II.

THE CAP FEED PATENT.

Novelty. The second patent is for a device which receives cans from the can feeding device above described and delivers same with the can top thereover to the double seaming machine. This cap feed device as claimed in the combination of claim 1 is novel in that old elements are brought together into a new combination to co-operate to carry the can and can top in continuous motion without stop, jerk or jar and to deliver same together simultaneously to the double seamer machine. [75]

Claim 1 is the only claim alleged to be infringed. It includes: (1) a revoluble disk, (2) a pair of curved rails arranged above same on each side thereof, (3) a can top rack, (4) means controlled by the can to cause the bottom cap to drop, and (5) a finger on the disk for engaging and conveying the cap along the rails.

None of these elements of themselves are new but the combination of the Wilson and Sumner patent, containing the rotary can-carrier with a member thereon to engage and advance the can tops and

convey them on the rails directly above the can carried by the disk, is new, and not to be found in any of the citations of prior art. Defendants' device comes within this classification.

As distinct from the classification above given of the Wilson and Sumner patent, the prior art shows several patents where the caps are moved or fed by a pusher member onto the can top. In this classification appear Forry, Gray and Wegner.

Forry, No. 688,622, Dec. 10, 1901, Vol. II, No. 51, has straight rails. The can top is carried to the top of the can and sealed immediately.

Gray, No. 944,456, June 6, 1911, Vol. II, No. 18, has no disk and no curved rails but a slotted plate.

Wegner, No. 964,721, July 19, 1910, Vol. II, No. 19, merely shows a feeding mechanism. It has no disk and no curved rails but extensions of stops, one shorter than the other and the caps are moved between them. It has no can-controlled feed.

The third classification is one where the caps are pushed into position over the can and carried beneath the rail as in Guenther, No. 1,049,227, Dec. 31, 1912, Vol. II, No. 29. It has no can-controlled means of cap feed and no finger on the disk.

Livingston, No. 690,593, Jan. 7, 1902, Vol. II, No. 52, has no curved rails.

The fourth classification is one where the caps are delivered to position over a can which caps are supported in [76] part on a stationary rail and part on a carrier which advances the can. Of this class are Johnson, Kruse and Palmer, the latter with a downwardly projecting finger.

Johnson, No. 1,040,951, Oct. 8, 1912, Vol. I, No. 28, a part of this mechanism is also shown in *Johnson*, No. 1,074,325, Sept. 10, 1913, Vol. II, No. 15. There is no finger on the disk but a recess in the can-receiving depressions on the periphery of the disk carries the cap feed after it has come up against the shoulder of the recess.

Kruse, No. 1,152,188, Aug. 31, 1915, Vol. II, No. 35, does not have a pair of curved rails but an outer rail and inner ledge similar to *Johnson*. The can top is advanced by the shoulder on the disk but said shoulder does not engage the can top to move it into the chute.

Palmer, No. 947,685, Jan. 25, 1910, is not in the bound volume. It has no can-controlled feed means and no finger on the disk carrying the can. The can top is guided but not supported by spaced curved rails. There is a finger that extends down from the arms. A wooden model of this is in evidence as defendants' "L-3."

Another patent introduced in evidence is *Austin*, No. 532,518, Vol. II, No. 22, of which there is a wooden model, defendants' "M-3." In this patent the chuck is raised by a cam so that the edge of the can pushes up a finger which engages a cap and carries it on curved rails over the can which is advanced by a star wheel and supported by a chuck.

The *Krummel* patent, No. 1,091,468, Mar. 24, 1914, Vol. II. No. 53, of which there is a wooden model, X-1, has a gravity feed of caps and there are no means controlled by the can for delivering the can top to the rails.

The plaintiffs' patent is a narrow one with a narrow range of equivalents.

Non-infringement. Defendants' machines and each thereof contains or contain a rotary member for receiving and moving cans while receiving caps, cap feed means for supplying caps to the cans and controlled by the cans as fed, curved rails [77] above the plane of the top of the rotary member and respectively inwardly and outwardly of the periphery thereof, and means on a rotary member for engaging a released top or cap and delivering the same upon said rails above the can top.

In defendants' mechanism the stack of can tops is not arranged as in plaintiffs' patent, directly above the path of travel of the cans or of the curved rails but is a trifle to one side so that the finger to advance the cap cannot operate to engage and carry on the cap until a pusher bar has first advanced said cap.

The claim in suit describes the finger on the disk "for engaging the delivered can top and * * * " The fact that the pusher bar delivers the can top before it is engaged by the finger does not seem to be greatly material.

Exhibit "O" is the model of the defendants' cap feeding device claimed to infringe.

Whether or not this claim is infringed depends upon the construction given to the term "disk." The word "disk" is used a number of times in the claim and inasmuch as the patent is one of a narrow scope the word will be taken to mean a circular device with spaced apertures which will move the

can at the same rate of speed throughout its course of travel.

The finger for engaging the can top in plaintiffs' structure is placed on the disk and moves the can top in a horizontal plane, the can coming up an incline to contact its cap which gradually presses the contents down within the can.

In defendants' structure the can travels in a horizontal plane and the rails carrying the cap are slanted down to bring the cap down on to the can. This necessitates a finger-carrying device to raise and lower the finger engaging the caps to push them along down the incline of the rails.

In defendants' device there are several can-receiving members which accelerate their speed, and operative arms with fingers on them. Defendants' can carrying members are not the equivalent of plaintiffs' disk or wheel. The mechanical structure and mode of operation is different. This is true also of the cap moving finger on the arm which moves up and down and [78] accelerates the forward path of travel. For these reasons I find that claim 1 of patent 2 is not infringed.

III.

THE CAN HEADING MACHINE PATENT.

This is the main patent, Exhibit 3, and is for the double seaming machine. It consists of a continuously operative two turret double seaming machine adapted to receive, while in motion, cans and can tops simultaneously from the can top feeding device, seaming the cans and can tops together on the first turret on a partial revolution thereof,

means for transferring the cans from the first to the second turret, while in motion, where the seam is rolled on a partial revolution thereof by means controlled by the rotation of said carriage and the can discharged, all without start and stop, jerk or jar, at high speed without spill.

Prior to the plaintiffs' invention there were intermittent devices with two stations and one turret or carriage, the seam on the first station being accomplished by rolling rollers around the can tops while the can was stationary and then after it was transferred to the second station the can was spun against the compression rollers. There were also *continuously* operative devices, such as the Master saw at the American Can Co. plant, where on a revolving single turret a seaming head with two sets of rollers did both operations on the one chuck.

No prior device appears, however, which used two turrets for performing the two operations, one on the first turret and the other on the second. There were two turret machines in the prior art which flanged the can on a first turret and placed a cap thereon while transferring same to a second turret and used a seaming head with two sets of rollers to perform the two operations of seaming and rolling while on the one chuck. [79]

The Patent Office on June 30, 1915, page 35, as numbered in pencil by me, of the file-wrapper, Exhibit 3, in rejecting original claim 1, stated:

“* * * there is no invention in mounting a tool for double seaming a can cap to a can body on a turret, as shown by Black and then feed-

ing the can body from that turret to a similar one upon which the compressing operation is performed by another tool.”

In rejecting original claims 2-4 the reason given was, “Johnson shows means for feeding can bodies and caps simultaneously to the operating machine. In view of this, there is no invention in providing any type of seaming machine with can body and cap feeding means, as disclosed by Johnson.”

Plaintiffs’ invention consists, however, of more than merely mounting a tool for double seaming a can top to a can body on a turret and then feeding the can body from that turret to a similar one on which the compressing operation is performed by another tool, with means for feeding can bodies and caps simultaneously to the operating machine. Plaintiffs’ invention not only mounts a tool for double seaming a can top to a can body on a turret, and feeds the can body from that turret to a similar one on which the compressing operation is performed, and provides for feeding can bodies and caps simultaneously to the operating machine, but it also provides for: The simultaneous delivery of cans and can tops to a first revoluble turret, while in motion, and there seaming the cans and can tops together on the first turret on a partial revolution thereof; then a transfer of the cans to a second turret while both turrets are in motion. and then on a partial revolution of the second turret rolling the seam by means controlled by the rotation of said carriage and discharging cans. The ele-

ments and parts are so arranged and devised that they have a synchronous continuous operation. The machine allows a steady flow of cans, particularly filled cans, without any stop or start, jerk or jar, and consequent spill, in a smooth flowing line, permitting a number of cans to be operated on simultaneously and practically doubling the speed of the old intermittent machines. The arrangement of gears, shafts and spindles is such that the can capping [80] machine delivers to the first turret at exactly the right instant a can which is received on the revolution of the turret by the can supporting means which vertically reciprocates to clamp the can and cap firmly for the seaming operation which is performed while same is being carried on a partial revolution of the turret so that the can may be carried off from the chuck of the first turret and delivered to the supporting means of the second turret while revolving and there spun against rollers on a partial revolution of the turret and discharged.

This is an invention of great merit which went into immediate commercial use and attained such success that the defendants with the prior art before them preferred to adopt plaintiffs' continuously operative two turret type of machine than to use the intermittent two station old types of machines or the old types of continuous operating one turret machines with the double acting seaming head.

Plaintiffs' commercial machine is an improvement over the prior art in that it makes a somewhat better seam with less tits. The improvement is

not so much in the seam itself as in that there is less spill in operation with greater speed than in other commercial machines used for seaming filled cans.

Making less spill is a distinct advantage irrespective of the rate of speed of the machine. This is particularly true for the gallon cans which make less spill regardless of the rate of speed.

The prior art shows of the intermittent type of machines Brenzinger, Johnson and Kruse as typical, and of the continuous operating machines, Black, Nichols and Dugan.

Intermittent Machine Examples.

Brenzinger, No. 213,482, Feb. 27, 1906, Vol. II, No. 12, Vol. I, No. 23. This is an intermittent machine with two stations; one for each operation, and a moving belt for carrying a can from one station to another. It does not contain two revoluble carriages nor provide for coincident delivery of cans and caps to a first *revolvule* carriage, [81] nor for transfer of cans from one revolving carrier to another revolving carriage. In fact it has no rotating carriage whatever.

Johnson, No. 1,040,951, Oct. 8, 1912, Vol. I, No. 28, is another type of intermittent machine. A part of this patent is also included in

Johnson, No. 1,074,325, Sept. 30, 1913, Vol. II, No. 15, which was cited by the Patent Office as a reference. The Johnson patent has two turrets, one for flanging, the other for seaming and rolling, but the Johnson patent is a one turret machine in so far as the curling and compressing rolling operations are

concerned. It has no means for coincidentally delivering the can tops and cans to the can supporting means while the carriage is rotating. It has no seaming means on the first carriage but same is for a flanging operation. It shows a seaming head similar to defendants' 14-P head used in the intermittent machine, which is not claimed to infringe. The 14-P head seams the can flange and cap while the machine is stopped.

Kruse, No. 1,152,188, Aug. 31, 1915, Vol. I, No. 33, discloses a vertical two station machine, using two seaming mechanisms having intermittently rotatable feed means for successively carrying the can and cap from the first to the second seaming means.

Continuous Machine Examples.

Black, No. 858,785, July 2, 1907, Vol. II, No. 34, Vol. I, No. 25. The wooden model of Black is defendants' exhibit "W-1" and is a continuously operating mechanism with (1) a disk or turret with four spindles with flanging mechanism thereon, (2) a transfer wheel consisting of a disk with four can receiving depressions in its periphery carrying the cans over a platform, (3) a second disk or turret with four spindles. While in the transfer wheel the can receives its top and is then delivered to the second turret. The curl of the seam is formed as shown in Figure 5 of the patent and the compression roller is shown in Figure 6. While the curler is [82] engaged the compression is disengaged, and *vice versa*. Both operations are performed on the same spindle while the turret is rotating.

This is one of the instances where the prior art shows two turrets with transfer means between. But this Black patent does not, and none of the prior art mechanisms, show two turrets; one for the first seaming operation and the other for the second seaming operation.

The continuity of plaintiffs' patent mechanism is due to the use of these two turrets for seaming, with cap and can delivery to a first turret and transfer means operating between the revolving turrets, all in synchronism by means of gears, shafts and spindles, attendant features and parts, devised and arranged for that purpose. In prior devices, the continuity of motion, where existing, was obtained by the use of a double head for seaming; one roll to curl the can flange and can top flange together, then disengaging that and using another roll, it operated to compress the curl. The two rollers were attached to the seaming head and operated successively on the can and can top as the turret turned.

This Black 1907 patent is of this double seaming head type in a continuous operation machine. It was seven years after the Black patent before Wilson and Sumner filed, on Aug. 10, 1914, their application for a two turret continuous motion double seaming machine, in response to the demand created by the enormous growth of the packing industry and, it would seem, in anticipation of urgent demands for speedy machines created by the war.

Nichols, No. 1,096,957, May 19, 1914, Vol. I, No. 30, Vol. II, No. 11, is made up of four turrets: (a) for

flanging; (b) for feeding in and attaching caps; (c) for curling the cap and can together; and (d) for compressing the roll. The cans are fed into and passed down through chutes by gravity. The machine operates on a horizontal axis instead of vertical, plaintiffs' patent. [83]

Dugan, No. 848,296, Mar. 26, 1907 Vol. I, No. 24. This machine operated continuously, carrying the cans in planetary movement and causing them to spin continuously and to be successively and continuously acted upon by a first set of seaming rolls and then by a second set of seaming rolls, all of which rollers move with the can turret.

The six patents above discussed are the ones selected by defendants' expert as most nearly approximating the plaintiffs' patent.

As we have seen these six patents considered either jointly or separately do not contain the essence of plaintiffs' invention, or the construction, combination and inter-relation of the parts and features thereof.

In plaintiffs' patent there are eighteen combination claims that were allowed by the patent office. That of itself raises the presumption of novelty and invention for each of these eighteen claims, particularly in view of the fact that none of the references and none of the patents contained in the prior art contain the combinations of any of these eighteen claims.

Claims 1, 2, 3, 4, 5, 6, 7, 9, 12, 14 and 16 cover the mechanism performing both operations and contain all the elements in greater or the same detail and

aspects which we have above described as plaintiffs' invention.

Claims 8, 10, 11, 13, 15, 17 and 18 cover sub-combinations for performing the first operation.

These claims covering the first operation are more specific than the ones covering both operations in that they set out specific mechanical detail for forming the seam. Said mechanical details are also covered in a number of the claims which cover both operations.

This brings us to a consideration of the preferred form of seaming means for plaintiffs' first operation. [84]

Seaming Means for First Operation.

Brenzinger, No. 813,482, Feb. 27, 1906, Vol. II, No. 12, Vol. I, No. 23. On this intermittent machine rollers are rotated about the can to form the curl of the seam. The rollers are mounted on slides radially operated and with the slides the rollers are operated in a plane.

Black, No. 858,785, July 2, 1907, Vol. II, No. 34, Vol. I, No. 25, wooden model, Defendants' Exhibit "K-3." In this continuous operation machine with the double seaming head the rollers are rotated about the can which is held against the rotation around its own axis. The rollers are on rocking levers oscillating.

Guenther, No. 1,049,227, Dec. 31, 1912, Defendants' Exhibit "J-3," No. 6, particularly figures 7, 9 and 10. In this intermittent machine the means for performing the first seaming operation comprise a pair of curling rollers carried upon a sleeve adapted

to be rotated around the central axis of the can where the latter is centered by a depending flange approximately circular, cut out at portions for the passage of the levers and grooved rollers. The rolls are automatically forced inwardly by a cone member to form the seam. The cone is mounted to slide up and down on the hub of the revoluble head and is provided with a ring having slidable blocks pivotally connected with the forked end of a bell crank lever having a fulcrum on the main frame and provided with a friction roller engaging a cam groove in a cam secured to a cam shaft. This seaming head is Exhibit "P."

These Brenzinger, Black and Guenther patents are all illustrations of rollers running around the can which does not rotate on its own axis.

Walsh, No. 492,076, Feb. 21, 1893, Vol. II, No. 31. This patent provides for an encircling head which is stationary. The tool on the inner side of the cap flange pushes the cap flange and can flange into depressions on the encircling head and revolves to form the seam. This may be classified as a stationary head with a groove within which the can is rotated, [85] the head physically encircling the can top.

The Guenther 1912 patent first seaming operation means also physically encircles the can top and the seaming rollers traverse an encircling path of travel around the can.

Wegner, No. 1,104,751, July 21, 1914, Vol II, No. 14. This patent is on a single turret type machine in which the cans with self-imposing can tops are

rolled against the stationary seam forming tool as they are being advanced with the turret. This tool consists of a large stationary convexly curved or circular seaming tool B preferably comprising a series or plurality of separately and independently adjustable seam forming segments, preferably six in number, and a series or plurality of separately and independently adjustable seam closing segments. It is described in the patent, page 1, beginning line 86. It shows a circle in the center around which the cams revolve so as to form the seam. This circle is not regular in shape but is irregular so as to operate as a cam to put a greater pressure on the can and cap in one place than when the can is in another location. There are no means surrounding the top of the can and cap acting to center them in alignment for the seaming operation.

This Wegner patent is the best illustration of a nonencircling seaming means. The seaming means does not take a circular course of travel around the can, nor does it physically encircle the can to center it or otherwise.

Plaintiffs' first seaming operation is accomplished by means of a curling ring encircling the can-top and end and adapted, when forced into a position eccentric to the can top and end, to crush or upset the can and top flanges.

This eccentricity of the ring and can with its imposed top is accomplished by pressure externally applied to the ring by means of a stationary cam, around which cam the curling ring rolls.

Plaintiff's curling ring with the can top and cap within, the ring being eccentric to the can top and cap and the area of contact encircling the can top with the rotation of can [86] and ring differs from Brenzinger, Black and Guenther types in that the can is not held stationary with respect to the seaming means during the seaming operation. It differs from the Walsh patent in that the seaming means is not held stationary. Within this the can is rotated. It differs from the Wegner patent in that the can is not spun against an external ring or roller. It also differs from the seaming and in Dugan, No. 848,296 (p. 45 above) where the cans are spun against rollers as in the second operation of many prior patents which is accomplished by spinning the can against rollers which are relatively fixed or stationary.

There is, therefore, distinctive novelty in this specific means of rolling the seam by means of a ring encircling the can-top and turning with the can. This turning of the can on its own axis is termed "spinning" in various and sundry claims.

All of the claims except 2 and 4 contain the novelty of this spinning of the can on the first operation, setting out in more or less detail various elements of this novel encircling means and operation.

Plaintiffs' operation, known as "spinning the can" on the first operation is distinguished from the usual method employed by defendants and others who maintain the can against rotation on

the first seaming operation. The term "spinning" refers also to the deforming of the metal of the can and cap by the first seaming operation, both as to patent of plaintiffs' Exhibit 3 patent and defendants' infringing P-24 machine, within the meaning of Webster's International Dictionary, "to shape, as malleable sheet metal, into a hollow form, by bending or buckling it by pressing against it with a smooth hand tool or roller while the metal revolves, as in a lathe." All of these claims are therefore held valid on that ground, of the encircling means for spinning the can on the first operation.

The combinations themselves of these claims are novel. [87]

This specific element of novelty is thus described in the several claims.

Claim 1 provides for "a series of spindles thereon, (the continuously revoluble turret) disks on said spindles, means for rotating the spindles by the rotation of the revoluble member, means for clamping a can-top and can against each of the disks to cause the cans to rotate as they are advanced by the revoluble member, means encircling and forming a seam between the can top and can while it is being advanced a partial revolution of the revoluble member, * * "

Claim 2 does not describe the spinning of the can, nor specifically describe the encircling means except "for forming seams between the can tops and cans while they are advanced on a partial

revolution of the carriage, * * ” but is novel in other respects.

Claim 3 describes the mechanism which would cause the rotation of the spindles revolubly mounted on the turrets and specifies also “can-top encircling and engaging disks on said spindles, * * means on said disks for forming seams between the can tops and cans as they are advanced by a partial revolution of said last-named shaft, * * ,”

Claim 4 describes the means for revolving the spindles for the seam *rolling* means but does not require the spinning of the seam *forming* means or of the can being seamed, nor does it describe the seaming means' as “encircling,” but is novel in other respects.

Claim 5 specifies “means for spinning the can when encircled by the seaming means, * * ”

Claim 6 specified “means for spinning the can when encircled by the seaming means, * * ”

Claim 7 specified “means on said last named carriage (the one to which can tops and cans are continuously delivered) for encircling the can tops and cans to form a double seam, means for spinning the can and can top co-operating with said last named means, whereby the double seam is formed while the can is being advanced, * * ”

[88]

Claim 8 is a specific claim setting out the shaft, disks, stationary gear, pinions, means encircling the can-top and the stationary cam for co-operating therewith.

Claim 9 sets out the same elements as claim 8 in combination with the means for rolling the seam on the second turret.

Claim 10 contains much the same detail as Claim 8, specifically setting out "a stationary gear concentric with the shaft engaging said pinions whereby the cans are spun on rotation of the shaft while advancing, and means on said pinions arranged to encircle the can-top to form a double seam between the can top and can body."

Claim 11, after describing some of the details of the first operation, also specifies "a stationary gear concentric with the shaft engaging said pinions whereby the cans are spun on rotation of the shaft while advancing, means on said pinions arranged to encircle the can top to form a double seam between the can top and can body, comprising diametrically slidable seaming rings, and a stationary cam arranged to shift said rings as the cans are advanced."

Claim 12 provides for spinning the cans on both operations containing as one of its elements the following: "means whereby the rotation of said shafts will rotate said spindles and thereby spin cans carried by the supporting disks." Said claim 12 does not describe the seaming means as encircling the can tops but simply describes it as a "means controlled by the spindles carried by one of the shafts for forming a double seam between can tops and can bodies."

Claim 13 provides among other things, for "means for rotating the clamping means while ad-

vancing to spin the can and can top, and means encircling the can top for forming a double seam while the can and top are spinning and advancing.” This is a claim covering the first operation only.

Claim 14 also has among its elements the means above quoted in claim 13 and is a claim to cover both operations. [89]

Claim 15 specifies “means for rotating the can-top engaging disk to spin a can while advancing, and means encircling the can-top for forming a double seam while the can is spinning and advancing.” This claim covers the first operation only.

Claim 16 contains the same language above quoted for claim 15, and is a combination covering both operations.

Claim 17 describes the same spinning means with more detail, setting out the spindle, pinion and gear used in the first operation.

Claim 18 in describing a single operation gives the mechanical details “to spin a can and can top” and specifies also “means carried by the can top engaging disk encircling the can top for forming a double seam between the can top and can body as the latter is spun while the shaft is rotated.”

Claim 2.

Claim 2 of the patent reads as follows:

“In a can heading machine, a revoluble carriage, vertically reciprocal can supporting means on said carriage, means for coincidentally delivering can tops and cans to the can supporting means while the carriage is rotating, means encircling the can top for forming

seams between the can tops and cans while they are advancing on a partial revolution of the carriage, a second revoluble carriage, means for supporting cans on said second carriage, means for transferring the cans from the supporting means on the other carriage, and means controlled by the rotation of the second carriage for rolling the seam formed between the can tops and cans on the first carriage.”

It will be observed that claim 2 does not contain the element of novelty of spinning the can when encircled by the seaming means, but it sets out more broadly than the other claims the general invention of plaintiffs and there is nothing in the prior art which even approximates the combination as set forth in Claim 2. Claim 2 is therefore held valid.

Claim 4.

Claim 4 reads as follows:

“In a can heading machine, a pair of parallel vertically extending shafts one of which is tubular, means for rotating said shafts continuously in corresponding directions, a third shaft extending through the tubular shaft adapted to be rotated in a reverse direction in relation to said tubular shaft, a gear mounted on the third shaft, a cross head on the tubular shaft, a series of spindles on said cross head, pinions on said spindles [90] meshing with the gear on the third shaft, can top engaging means on said spindles, seam rolling means carried by said cross head co-operating with the can top engaging means to roll the

seams between the can tops and can bodies as they are spun by the rotation of said spindles during a partial revolution of the tubular shaft, means for supporting the cans to position the tops in operative relation to the seam rolling means, means on the other shaft for forming a seam between the can top and can body during a partial revolution of the shaft and while it is in motion, and means for transferring the cans from the seam forming means to the seam rolling means.”

It appears that this claim in reciting the mechanism begins with a description of the shafts, gearing and spindles and in the course of such recitation deals first with the seam rolling means which is the second operation and then with the seaming means which is the first operation.

Infringement.

Range of Equivalents. It is not necessary to say whether the plaintiffs' invention is of a pioneer character sufficiently broad for the broadest possible doctrine of equivalents. Plaintiffs were the first inventors of a continuously operative two turret double seaming machine, with the seaming operation on the first turret and the rolling operation on the second, and with a simultaneous delivery of caps and cans together to the first turret, and transfer means to the second turret all while the machine is in uninterrupted rapid motion. They are, therefore, entitled to a reasonably broad interpretation and application of equivalents.

Claim 2 is infringed and reads directly upon the defendants' structure. Both carriages are revoluble, the can supporting means on the first carriage is vertically reciprocal, it has means for coincidentally delivering can tops and cans to the can supporting means while the carriage is rotating, its seaming head encircling the can top for forming seams between the can tops and cans while they are advancing on a partial revolution of the carriage

It has means for transferring the cans from one carriage to another and means controlled by the rotation of the second carriage for rolling the seam.

The simultaneous feeding of caps and filled cans to the first turret of patent of Exhibit 3 and in defendants' machine, [91] excludes dirt, grease and the like from the cans, which substance would obviously invade the cans on machines of the Black and Johnson patent types where the caps are not fed to the cans on the first turret.

The only element where any differentiation is claimed is "means encircling the can top for forming seams between the can tops and cans while they are advanced on a partial revolution of the carriage."

This same element is described in claim 4 of defendant Guenther's patent, No. 1,441,195, Jan. 2, 1923, as follows:

" * * can-seaming means encircling said upper ends of the cans for partially forming a double seam between the can and its cap, while the can is carried by the turret in a stationary condition to the transferring means, * * "

Claim 2 is not confined to means in which the can spins, nor where it is stationary, as in defendant's device, but is broad enough to include encircling means to be operated while the turret is in motion both when the can is relatively stationary and when it spins.

The centering function of plaintiffs' curling ring is also contained in defendants' first seaming means as is evidenced by the following language of claim 4 of Guenther patent No. 1,441,195, as follows:

“ * * complementary centering devices disposed above platforms and into which the upper ends of the cans and their caps are projected, * * ”

In defendant's patent, above referred to, page 1, line 28, the specification reads:

“The present invention contemplates the use of a seaming machine having two vertical turrets disposed parallel to each other, each of said turrets being equipped with multiple spindles whereby the can and its cap will be initially seamed when standing *still or in a slow operation* * * ”

Plaintiffs' seaming device encircles the can while it is in a slow operation, to wit: Turning one and one fourth turns during the partial revolution of the turret while the can is on the chuck. [92]

The issuance of a subsequent patent to the defendant Guenther raises the presumption that there is a difference between plaintiffs' patent and his own in structure.

Bliss et al. vs. Spangler, 217 Fed. 394.

In the case last cited defendant had a later patent but infringement was nevertheless found.

The presumption is that there is patentable difference but not that by reason of the subsequent patent, infringement may be avoided.

The *Guenther* patent, No. 1,441,195, Jan. 2, 1923, has the same seaming head as contained in his patent of Dec. 31, 1912, No. 1,049,227 above discussed.

The defendants' 24-P machine has adapted and uses the same design and character of seaming tool for the first and second seaming operations that is used and has been used on the 14-P long prior to any alleged date of invention by the plaintiffs.

The seaming head for the first operation is Exhibit P. In the 1923 patent this seaming head has been adapted to operate on a revolving turret by means of cones, the same as in the earlier patent, but the cones in the later patent are operated by means of shifting yokes which are carried by a shaft extending upwardly fitted at their upper ends with rollers, which pass along a circular tracked cam by which they are given a reciprocating movement with pins.

Even if the *Guenther* 1923 machine be considered as having an advantage over plaintiffs' machine in that it curls a tighter seam on the first operation, it seems to me nevertheless dominated by plaintiffs' idea and plaintiffs' invention as covered by claims 2 and 4. The same final result, and

substantially the same first seaming result is accomplished and by substantially the same means.

Plaintiffs' seaming means when described, as in Claim 2 "means encircling the can top for forming seams between the can tops and cans" comes in the same classification as Brenzinger, Black, Guenther and Walsh, of which Branzinger, Black [93] and Guenther encircle the can-top by rollers traversing a circular course of travel around the can and can-top, and Walsh physically encircles the can-top and cap with a seaming head to form the seam. Guenther and plaintiffs' patented structure both physically encircle the can top and can and form the seam by mechanically encircling the can-top with a circular path of travel for the impingement of the seaming means around the can top. Both also center the can and can top.

Plaintiffs' and defendants' first seaming means and all parts and features thereof and all the general combination of the machines, both as to detail and total combination and mode of operation are substantially the same.

It is plainly apparent that defendants' can seaming encircling means are the mechanical equivalent of plaintiffs' can seaming encircling means, the physical encircling feature not even being necessary to that end. I therefore find claim 2 is infringed.

As to Claim 4 plaintiffs' counsel has, in his brief, read claim 4 upon defendants' structure. We reproduce same having checked it with the patents referred to.

To apply Claim 4 of the main patent (of Exhibit 3) to Guenther's letters patent Numbers 1,441,195 and 1,440,143 and 1,450,418 it appears:

Referring now to those patents we find a "pair of parallel vertically extending shafts one of which is tubular" comprises the shaft 12 of patent 1,440,143, and the shaft 10 of patent 1,450,418.

"means for rotating said shafts continuously in corresponding directions"—the gear train, including the gear 20 of patent 1,440,143, and the unnumbered gear with which it meshes; and gear train 56, 59 and 60, patent 1,441,195.

"a third shaft extending through the tubular shaft adapted to be rotated in a reverse direction in relation to said tubular shaft"—the shaft 11 in patent 1,440,143; and shaft 42 in patent 1,441,195.
[94]

"a gear mounted on the third shaft,"—the gear 32 of patent 1,440,143.

"a crosshead on the tubular shaft"—the spider or crosshead 14 in patent 1,440,143.

"a series of spindles on said crosshead,"—the spindles 29 in patent 1,440,143.

"pinions on said spindles meshing with the gear on the third shaft,"—the pinions 31 meshing with the gear 32 of patent 1,440,143.

"can top engaging means on said spindles,"—the clamping heads 26 of patent 1,440,143.

"Seam rolling means carried by said crosshead co-operating with the can top engaging means to roll the seams between the can tops and can bodies as they are spun by the rotation of said spindles

during partial revolution of the tubular shaft,”—the seam rolling means shown in figure 2 in detail of patent 1,440,143.

“means for supporting the cans to position the tops in operative relation to the seam rolling means,”—the circular supports 24 at the upper ends of the spindles 17 in patent 1,440,143.

“means on the other shaft for forming a seam between the can top and can body during a partial revolution of the shaft and while it is in motion”—the seaming rollers 54 and their adjuncts of patent 1,440,143; and the seam forming means 36, 38 of patent 1,450,418, and their adjuncts; or the seaming rollers 31 and slotted rings or so-called “bell members” 35 of patent 1,441,195, and adjuncts.

“and means for transferring the cans from the seam forming means to the seam rolling means”—the so-called star wheel 35a of patent 1,441,195, or the transfer member 22, between the turrets A and B in patent 1,440,143.

The fact that defendants have added a shaft to the first turret has not changed the directions of motions or mode of operation of the other shafts or parts. It is an addition which does not avoid infringement. [95]

Stebler vs. Riverside Heights, etc., 205 Fed. 735.

The mode of operation of the defendants' machine and its parts, as covered by the combination of Claim 4, the combinations and subcombinations and parts are substantially the same.

In view of the above, I find claim 4 is also infringed.

The other claims of the patent I find not infringed as they all are limited more or less to means for spinning the can on the first operation which defendants' machine does not do.

The defendant Guenther before entering upon the manufacture of the 24-P machine herein charged to infringe took legal advice in regard to his rights in the matter as to whether or not there was any likelihood of his infringing any prior patents, including those of the plaintiffs, and the advice that he was given was that such structure would not infringe; it further appearing that the advice in regard to this matter was sought as early as May, 1918. That again when the defendants undertook the building of their machine in 1920 they were again advised that there was no infringement of any existing patent then known to their counsel, including the main patent in suit. That when the machine was completed it appears that defendants again had the matter resubmitted to their counsel with the same advice.

As the decree must run in favor of the defendant dismissing the complaint as to two patents and finding infringement as to one, I find the costs should be assessed two-thirds against the plaintiffs and one-third against the defendants. The defendant Guenther I find jointly liable with the defendant company.

Counsel were given 20 days from the date of receiving the draft report in which to present their

exceptions or suggestions thereto and leave was given either party to request and be privileged to have an argument upon points or questions raised at that time, such argument to be set by the Master as he might order. Exceptions and suggestions were [96] filed December 4, 1923, by counsel for plaintiffs and objections and requested findings were filed by counsel for defendants December 5, 1923. On December 7, 1923, the Master addressed a letter to defendants' associate counsel calling attention to the nature of defendants' objections and the Master's embarrassment in proceeding while there were any charges of bias or prejudice on the record. The charges not having been withdrawn the Master on December 14, 1923, rescinded the order allowing further argument, adopted the tentative conclusions he had reached on plaintiffs' exceptions before receiving defendants' objections, considered certain of defendants' objections well taken and that certain requested findings should be inserted and prepared this report in accordance with the draft report and amendments accepted.

I am fully satisfied that correct conclusions have been reached and all without bias or prejudice.

I conclude and report that plaintiffs are entitled to an injunction in the usual form as prayed for against infringement of claims 2 and 4 of patent No. 1,203,295, and to the usual decree for an assessment of damages and accounting of profits from February, 1921, when the first infringing machine was being constructed after full knowledge

of plaintiffs' patent, to the date of the Master's report.

Respectfully submitted, December 20, 1923.

CHARLES C. MONTGOMERY,
Special Master. [97]

Filed Dec. 21, 1923.

[Title of Court and Cause.]

MEMORANDUM OPINION.

July 14, 1924.

RAYMOND IVES BLAKESLEE, Esq., and
J. CALVIN BROWN, Esq., Attorneys for
Plaintiffs.

CHARLES E. TOWNSEND, Esq., Attorney for
Defendants.

PARTRIDGE (Orally).—The above matter was heard in Los Angeles, by the Master, Mr. Montgomery.

The action is in form an action for an injunction, damages and accounting for infringement of a patent for a can heading machine. The defense raised was, in the first place, that the patents in suit were void in that they were anticipated by a publication and previous patents. The master found that the first two patents of the plaintiffs were not infringed, but that the third, or the patent for a combination, was valid and that two claims of it were infringed.

The evidence was exceedingly voluminous and briefs have been filed, as well as four days' oral

argument. I wish that I could take the time to write an opinion in the cause, but the pressure of business here is such that it is impossible.

However, the state of the art at the time of the issuance of plaintiffs' third patent (the one that was found to be infringed) was that there were in the market and patents issued therefor, various single turret devices by which cans could be closed without the use of solder. The plaintiff, however, for the first time, devised a two-turret machine, by which cans could be received into the first turret with means by which the speed of the cans could [133] be accelerated and in the first turret perform what is known as the first seaming operation by means of a certain eccentric ring moving around the rim of the can. It also embodied a device by which, as the can passed on its way, there was delivered by means of a trip, a cover directly over and upon the can. It then contained means by which the can was passed from the first to the second turret and there the final seaming was concluded, the result of which was that a perfectly air tight seam was created, without the use of solder or anything of that sort.

The defendants' device is in practically all respects the same as the plaintiffs', except that the first seaming operation is performed, not by an eccentric ring, but by a series of rollers worked with a cone.

Now then, it is evident from all the testimony that was produced, that the method of sealing cans without the use of solder prior to the plaintiffs'

patent was imperfect, for the reason that these cans as used by the canning companies, are filled at the time they are passed through the machine. It is, therefore, of the utmost importance that two things be accomplished: The first is that the speed of the can be accelerated gradually and that the cans pass through the machine without pause, so that the contents will not be spilled or slopped out; and secondly, that the cans be hermetically sealed so no air can reach the fruit or vegetables contained in them. Both of these were accomplished by the plaintiffs' machine and commercial use of it has demonstrated its utility.

It is claimed on behalf of the defendants, however, that it is a mere aggregation of prior elements, while plaintiffs contend that it is a combination. In the case of *Loom Co. vs. Higgins*, 105 U. S. 591, it is said, "that if a new combination and arrangement of known elements produce a new and beneficial result, never obtained before, it is evidence of invention." Later cases, however, have broadened this rule; particularly the case of *Potts vs. Creager*, 155 U. S. 608, from which these principles are fairly deducible:

That is, first, that if the new use is so nearly analogous [134] to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use;

Secondly, if the relations between them be remote, and especially if the use of the old device produce a new result, it may be invention;

Thirdly, in considering this question, the fact that defendants obtained a patent of their own to accomplish their result is to be considered; and

Fourthly, the doctrine of the *Goodyear Dental Vulcanite Company vs. Davis*, to the effect that where novelty is in doubt, the fact that the device has gone into general use, and displaced other devices employed for a similar purpose, is sufficient to turn the scale in favor of the invention.

Applying this principle, it is perfectly apparent to me that this patent, that is the third patent of plaintiff in suit, is a true combination and not an aggregation and that it does not produce a new result, it produces a beneficial advance on the old result, in that its seaming is tight and the fruit is not spilled.

A motion was made to dismiss the Los Angeles Can Company as plaintiff and I can see no reason why defendant could object to that. The Los Angeles Can Company is therefore dismissed.

The findings and judgments as recommended by the Master are approved. The exceptions are all overruled. Injunction will issue against invention claims 2 and 4 of patent No. 1,203,295, with an accounting before the Master since February, 1921.

Judgment will be for the defendant as to the first two patents in suit.

The Master found that inasmuch as the judgment must go for defendant as to the first two patents, costs should be paid two-thirds by plaintiff and one-third by defendant. I am unable to agree with that for the reason that I think, under the

circumstances, the defendant infringed the third patent in suit with full knowledge of it. I therefore disapprove that part of the recommendation of the Master and direct that the costs be paid [135] entirely by defendant.

Filed July 17, 1924. [136]

[Title of Court and Cause.]

INTERLOCUTORY DECREE.

This cause having come on to be heard on exceptions to the report of the Special Master on reference herein heretofore made and ordered; and said exceptions having been argued by counsel; and briefs having been filed by counsel; and due consideration thereunto having been given, it is hereby

ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That United States letters patent No. 1,301,348, issued April 22, 1919, to plaintiffs Ray O. Wilson and Arthur D. Sumner have not been infringed by defendants.

2. That United States letters patent No. 1,250,406, issued December 18, 1917, to plaintiffs Ray O. Wilson and Arthur D. Sumner have not been infringed by defendants.

3. That United States letters patent No. 1,203,295, issued October 31, 1916, to plaintiffs Ray O. Wilson and Arthur D. Sumner, are good and valid in law as to each and all of the claims thereof,

and entitled to a broad interpretation, *but none of the claims thereof other than claims 2 and 4 have been infringed by defendants.

4. That the plaintiffs are the owners of said letters patent hereinabove enumerated and each thereof.

5. That the defendants have jointly and severally infringed claims 2 and 4 and each thereof of said letters patent No. 1,203,295, by making, using and selling to others to use, or leasing or disposing of to others to use, machines for heading cans and capping or closing cans, known as P-24 or 24-P [137] machines and so or otherwise referred to in the record of this cause.

6. That plaintiff Los Angeles Can Company be, and hereby is, dismissed as a party plaintiff over objections of defendants.

7. That the exceptions of said report of said Special Master be and hereby are all overruled.

8. That an injunction be issued against defendants, Angelus Sanitary Can Machine Company and Henry I. Guenther, perpetually enjoining and restraining them, their officers, directors, agents, attorneys, workmen, servants, employees, and associates, and each and every of them, from hereafter making or causing to be made, selling or causing to be sold, leasing or causing to be leased, or otherwise disposing of or causing to be disposed of, in any manner, directly or indirectly, any machine or device or mechanism for heading cans or capping or

*Amended by order of August 25th, 1924.

closing cans, such as that heretofore made or used or sold or leased or disposed of by defendants, and known as P-24 or 24-P machines or the like, or any machine or device or mechanism containing or embodying the inventions patented in or by claims 2 and 4 of said letters patent No. 1,203,295, or any machine or mechanism or device capable of being used in infringement thereof, or any part or parts of or for any such machine or device or mechanism capable of being combined or used in infringement thereof, and from directly or indirectly infringing upon either or any of said claims 2 and 4 of said letters patent No. 1,203,295 in any manner whatsoever.

9. That plaintiffs recover from defendants Angelus Sanitary Can Machine Company and Henry I. Guenther, and each of same, the profits and damages caused by, accruing, flowing, or received, since February, 1921, from said defendants' [138] infringement and each infringement of said letters patent No. 1,203,295.

10. That an accounting be had to determine the profits and damages caused by, accruing, flowing or received from the infringement and each of same by defendants, as aforesaid.

11. That this cause be referred to Charles C. Montgomery, Esq., as Master *pro hac vice* to ascertain such profits and damages and report the same to the Court.

12. That the findings and judgments as recommended by the Special Master are approved, with the exception of the recommendation as to costs,

which recommendation is disapproved and it is ordered that the costs be paid entirely by defendants.

13. That plaintiffs have and recover judgment against defendants Angelus Sanitary Can Machine Company and Henry L. Guenther and each of same for the sum \$——, plaintiffs' entire costs and disbursements herein, to be taxed.

14. That as to letters patent No. 1,301,348, issued April 22, 1919, and No. 1,250,406, issued December 18, 1917, held not to have been infringed, it is ordered that the bill of complaint be dismissed in respect thereto.

15. That as to letters patent No. 1,124,553, issued Jan. 12, 1915, originally included in this suit and withdrawn by plaintiffs, it is ordered that the bill of complaint be dismissed in respect thereto without prejudice.

Dated: August 4, 1924.

JOHN S. PARTRIDGE,
U. S. District Judge.

Approved as to form, as provided in Rule 45.

Solicitors and Counsel for Defendants.

Decree entered and recorded 8/7/24.

CHAS. N. WILLIAMS,
Clerk.

By Louis J. Somers,
Deputy Clerk. [139]

Filed Aug. 7, 1924. [140]

ORDER AMENDING INTERLOCUTORY DECREE.

Sufficient cause thereunto appearing, it is ORDERED that the Interlocutory Decree herein dated August 5, 1924, may be and the same is hereby amended by substituting a semi-colon for the period at the end of paragraph 3 thereof, and adding thereafter:

“but none of the claims thereof other than claims 2 and 4 have been infringed by defendants.”

JOHN S. PARTRIDGE,
U. S. District Judge.

Dated: San Francisco, California, August 25th, 1924.

Approved as to form, as provided in Rule 45.

_____,
Solicitor and of Counsel for Defendants.

Decree entered and recorded Aug. 29, 1924.

CHAS. N. WILLIAMS,
Clerk.

By Edmund L. Smith,
Deputy Clerk.

Filed Aug. 29, 1924. [141]

[Title of Court and Cause.]

WRIT OF INJUNCTION.

The United States of America,
Southern District of California,
Southern Division,—ss.

The President of the United States of America, to
Angelus Sanitary Can Machine Company, and
Henry L. Guenther, Defendants in the Above-
entitled Cause, Their Officers, Directors,
Agents, Attorneys, Workmen, Servants, Em-
ployees, and Associates, and Each and Every
of Them, GREETING:

WHEREAS, Ray O. Wilson, Arthur D. Sumner
and Franklin F. Stetson have filed on the Chancery
side of the District Court of the United States for
the Southern District of California, in the Southern
Division thereof, a bill against Angelus Sanitary
Can Machine Company, a corporation, and Henry
L. Guenther, both personally and as president of
said defendant corporation, and, pursuant to an
interlocutory decree dated August 5, 1924, have ob-
tained an allowance of injunction,

NOW, THEREFORE, we, further having re-
spect to the matters in said bill contained, do hereby
strictly command and perpetually enjoin and re-
strain you, your officers, directors, agents, attorneys,
workmen, servants, employees, and associates, and
each and every of them, from hereafter making or
causing to be made, selling or causing to be sold,
leasing or causing to be leased, or otherwise dispos-

ing of or causing to be disposed of, in any manner, directly or indirectly, any [141½] machine or device or mechanism for heading cans or capping or closing cans, such as that heretofore made or used or sold or leased or disposed of by you or either of you, and known as P-24 or 24-P machines or the like, or any machine or device or mechanism containing or embodying the inventions patented in or by claims 2 and 4 of said letters patent No. 1,203,295, or any machine or mechanism or device capable of being used in infringement thereof, or any part or parts of or for any such machine or device or mechanism capable of being combined or used in infringement thereof, and from directly or indirectly infringing upon either or any of said claims 2 and 4 of said letters patent No. 1,203,295 in any manner whatsoever (in accordance with the decretal provision in that regard of paragraph 8 of the interlocutory decree made, and signed herein August 5, 1924, and entered herein August 7, 1924).

Hereof fail not, under penalty of the law thence ensuing.

WITNESS the Honorable BENJAMIN F. BLEDSOE, United States District Judge, for the Southern District of California, this 7th day of August, 1924.

[Seal]

CHAS. N. WILLIAMS,
Clerk.

By R. S. Zimmerman,
Deputy Clerk. [142]

Filed Aug. 26, 1924. [143]

[Title of Court and Cause.]

PETITION FOR ORDER ALLOWING AP-
PEAL.

To the Honorable Court, Above Entitled:

The above-named defendants, Angelus Sanitary Can Machine Company and Henry L. Guenther, conceiving themselves aggrieved by the decree filed and entered on the 7th day of August, 1924, in the above-entitled cause, do hereby appeal therefrom to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit for the reasons and upon the grounds specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, that a citation issue as provided by law, and that a transcript of the record, proceedings, exhibits and papers, upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco.

And your petitioners further pray that an order be made fixing the amount of security which the defendants, Angelus Sanitary Can Machine Company and Henry L. Guenther, shall give and furnish upon such appeal, and that a [144] citation to plaintiffs may issue accordingly.

Dated: August 7, 1924.

CHAS. E. TOWNSEND,
JAS. E. KELBY,
Solicitors for Defendants. [145]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The foregoing petition for appeal is allowed upon the petitioners filing a bond in the sum of Three Hundred Dollars (\$300.00), with sufficient sureties, to be conditioned as required by law.

And it is further ordered that all further proceedings in this Court, except the issuance of preliminary injunction, be stayed until the further order of this Court pending decision on appeal by the Circuit Court of Appeals for the Ninth Circuit.

JOHN S. PARTRIDGE,

Judge of the United States District Court for the Northern District of California, and Designated by the Presiding Judge of the Circuit Court of Appeals for the Ninth Circuit to Hear and Determine the Above-entitled Cause.

Dated: August 7, 1924. [146]

Filed Aug. 11, 1924. [147]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Now comes Angelus Sanitary Can Machine Company, a corporation, and Henry L. Guenther, defendants in the above cause in the court below, and appellants herein, by Chas. E. Townsend, Esq., their solicitor and counsel, and say that in the record and proceedings in the said cause in the said court

below there is manifest error, and they particularly specify as the errors upon which they will rely and which they will urge upon their appeal in the above-entitled cause:

(1) That the District Court of the United States for the Southern District of California, Southern Division, erred in holding that letters patent No. 1,203,295 were valid.

(2) That the District Court of the United States for the Southern District of California, Southern Division, erred in holding that letters patent No. 1,203,295 were infringed either as to Claims 2 and/or 4 or any claims of said patent.

(3) That the District Court of the United States for the Southern District of California, Southern Division, erred in holding that Claims 2 and 4 of patent No. 1,203,295 and/or either of them represented true combinations and not aggregations.

(4) That the District Court of the United States for the Southern District of California, Southern Division, erred in not dismissing plaintiff's bill.
[148]

(5) That the District Court of the United States for the Southern District of California, Southern Division, erred in approving the findings and judgments as recommended by the Master.

(6) That the District Court of the United States for the Southern District of California, Southern Division, erred in overruling the exceptions of the defendant.

(7) That the District Court of the United States for the Southern District of California, Southern

Division, erred in decreeing that an injunction should issue with respect to patent in suit No. 1,203,295, and particularly Claims 2 and 4 thereof.

(8) That the District Court of the United States for the Southern District of California, Southern Division, erred in ordering an accounting.

(9) That the District Court of the United States for the Southern District of California, Southern Division, erred in rendering judgment against the defendant with respect to patent in suit No 1,203,-295.

(10) That the District Court of the United States for the Southern District of California, Southern Division, erred in awarding costs against the defendant.

(11) That the District Court of the United States for the Southern District of California, Southern Division, erred in dismissing the Los Angeles Can Company as a party plaintiff.

(12) That the District Court of the United States for the Southern District of California, Southern Division, erred in deciding "that the method of sealing cans without the use of solder prior to the plaintiffs' patent was imperfect," it being contrary to the facts and the evidence. [149]

(13) That the District Court of the United States for the Southern District of California, Southern Division, erred in holding that acceleration of can travel was part of patent in suit No. 1,203,295, the only patent on which the plaintiffs' contentions were sustained.

(14) That the District Court of the United States for the Southern District of California, Southern Division, erred in the application of the law and the facts.

San Francisco, California, August 7, 1924.

CHAS. E. TOWNSEND,

JAS. E. KELBY,

Solicitors and Counsel for Defendants.

Filed Aug. 11, 1924. [150]

[Title of Court and Cause.]

ORDER ALLOWING WITHDRAWAL OF
ORIGINAL EXHIBITS.

On motion of Chas. E. Townsend, Esq., solicitor for defendants, and good cause appearing therefor, it is by the Court now ordered:

That all exhibits in the above-entitled case, both plaintiffs' exhibits and defendants' exhibits, including models, drawings, copies of patents, books and printed publications, and which are impracticable to have copied or duplicated, be, and they are hereby allowed to be withdrawn from the files of this court in said case and transmitted by the Clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record upon appeal for the defendants herein to the said Circuit Court of Appeals; said original exhibits to be returned to the files of this court upon the de-

termination of said appeal by said Circuit Court of Appeals.

JOHN S. PARTRIDGE,

Judge of the United States District Court for the Northern District of California, and designated by the Presiding Judge of the Circuit Court of Appeals for the Ninth Circuit to Hear and Determine the Above-entitled Cause.

Dated: August 7, 1924. [151]

Filed Aug. 11, 1924. [152]

[Title of Court and Cause.]

BOND—STIPULATION FOR COSTS ON APPEAL.

The Angelus Sanitary Can Machine Company, a corporation, and Henry L. Guenther, having filed, or being about to file a petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment filed and entered in this matter on the 7th day of August, 1924.

NOW, THEREFORE, the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, authorized to do a general surety business as surety, hereby undertakes in the sum of Three Hundred and 00/100 (\$300.00) Dollars, and promises on the part of the Angelus Sanitary Can Machine Company, a corporation, and Henry L. Guenther, that it will pay all costs and damages which may be awarded against it on the said appeal,

or on the dismissal thereof; and the undersigned surety further consents that in case of default or contumacy on the part of the said Angelus Sanitary Can Machine Company, a corporation, and said Henry L. Guenther, execution to the amount named in this stipulation may issue against the goods, chattels and lands of the undersigned.

Signed, sealed and dated this 9th day of August, 1924.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By W. M. WALKER,
Attorney-in-fact.

Attest: S. M. SMITH, [Seal]
Agent.

The foregoing bond approved this 11th day of August, 1924.

JOHN S. PARTRIDGE,
District Judge.

Examined and recommended for approval as provided in Rule 29.

LAWLER & DEGNAN,
By OSCAR LAWLER,
Attorneys. [154]

State of California,
County of Los Angeles,—ss.

On this 9th day of August, 1924, before me, T. E. Seaton, a notary public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. M. Walker and S. M. Smith, known to me to be the persons whose names are subscribed to the foregoing instrument as the attor-

ney-in-fact and agent, respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as attorney-in-fact and agent, respectively.

[Seal] T. E. SEATON,
Notary Public in and for the State of California,
County of Los Angeles.

Filed Aug. 12, 1924. [155]

[Title of Court and Cause.]

BOND.

The Angelus Sanitary Can Machine Company, a corporation, and Henry L. Guenther, having filed their petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment filed and entered in this matter on the 7th day of August, 1924, and pursuant to the further order of this Court dated September 2d, 1924:

NOW, THEREFORE, the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, authorized to do a general surety business as Surety, hereby undertakes in the sum of Ten Thousand Dollars (\$10,000), and promises on the part of the Angelus Sanitary Can Machine Company, a corporation, and Henry L. Guenther, that it will answer and pay all damages and costs if they fail to make their plea good; and the undersigned

Surety further consents that in case of default or contumacy on the part of the said Angelus Sanitary Car Machine Company, a corporation, and said Henry L. Guenther, execution to the amount named in this stipulation may issue against the goods, chattels and lands of the undersigned.

Signed, sealed and dated this 18th day of September, 1924. [156]

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By C. K. BENNETT,
Attorney-in-fact.

Attest: L. C. ELLIS, (Seal)
Agent.

The foregoing bond approved this 18th day of September, 1924.

JOHN S. PARTRIDGE,
District Judge.

Examined and recommended for approval as provided in Rule 29.

CHAS. E. TOWNSEND,
Attorney.

State of California,
City and County of San Francisco,—ss.

On this 18th day of September, A. D. 1924, before me, John McCallan, a notary public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared C. K. Bennett, attorney-in-fact, and L. C. Ellis, agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the

- (3) Sub-paragraph (d) of paragraph numbered III of plaintiffs' bill of particulars dated June 5th, 1922.
 - (4) Transcript of entire record of all proceedings and testimony in full, in the exact words of the witnesses, in question and answer form.
 - (5) Final report of Special Master dated December 20th, 1923.
 - (6) Defendants' objections to report of Special Master in Chancery.
 - (7) Oral opinion of District Judge Partridge.
 - (8) Interlocutory decree dated August 4th, 1924.
 - (9) Writ of injunction dated August 7th, 1924.
- [159]
- (10) All exhibits in the cause.
 - (11) Defendants' petition for order allowing appeal.
 - (12) Defendants' assignment of errors.
 - (13) Order allowing appeal of defendants.
 - (14) Order allowing withdrawal of original exhibits.
 - (15) Order for full transcript for record on appeal.
 - (16) Defendants' cost bond on appeal.
 - (17) Citation to plaintiffs.
 - (18) This praecipe.

In addition to the above, please transmit to the Circuit Court of Appeals without certification, but in the nature of an exhibit, the four volumes of defendants' condensation of evidence filed before

the Special Master and returned into the above-entitled court.

CHAS. E. TOWNSEND,
LAWLER & DEGNAN,
JAS. E. KELBY,

Solicitors for Defendant-Appellants.

Dated: August 21, 1924.

Filed Aug. 25, 1924. [160]

APPELLEES' PRAECIPE PURSUANT TO
EQUITY RULE 75.

To the Clerk of the Court:

Pursuant to Equity Rule 75, please incorporate the following papers and documents in the Transcript of Record on Appeal in the above-entitled cause, omitting title of cause, as follows, all in addition to those papers and documents specified in appellants' praecipe:

Plaintiffs' motion and notice of motion for bill of particulars, filed August 7, 1922.

Plaintiffs' motion and notice thereof for further bill of particulars, filed November 27, 1922.

Plaintiffs' objections to defendants bill of particulars and authorities, filed December 6, 1922.

Notice of defendants, dated April 17, 1922, of filing two blue-prints pursuant to order of Court as required by order for bill of particulars, with said blue-prints.

Defendants' bill of particulars pursuant to order of Court made October 2, 1922.

Affidavit of Henry L. Guenther, re bill of particu-

lars, dated May 27, 1922, with blue-prints attached.

Plaintiffs' exceptions to report of Special Master.

In addition, subject to Rule 75, appellees give notice to the Clerk that they object to clause 4 of appellants' praecipe calling for transcript of entire record of all proceedings and testimony, etc., inasmuch as motion was presented and argued before Honorable John S. Partridge, who decided this case and signed decree herein, on Monday, August 25, 1924, asking that an order be made requiring condensation of the evidence, which said motion was taken under advisement, and appellees as yet have no notice of any ruling thereon.

Objection is also made to incorporation in the transcript of the item of clause 13 inasmuch as it was ruled on motion to set aside this order, by Judge Partridge, August 25, 1924, that this order should be amended to show that the final or perpetual [161] injunction was not stayed, no preliminary injunction having been granted, and the Court also took under advisement the amount of supersedeas security to be required of appellants for staying the other proceedings in the case, including the accounting and taxation and judgment for costs.

An objection is similarly made to the inclusion of item 15 of appellants' praecipe in the transcript on the same grounds as urged against the inclusion of item 4 *supra*.

Objection is also made to the final paragraph of appellants' praecipe, inasmuch as the four volumes referred to are not exhibits in the case, are not briefs in the case, are not records of proceedings in the case, and as the same cannot be transmitted

to the Circuit Court of Appeals without certification, there being no authority for any such procedure.

The Clerk is also asked to include the order made by Judge Partridge August 25, 1924, amending the interlocutory decree herein.

The Clerk is also asked to incorporate in the transcript on appeal this praecipe of appellees, and all orders now pending before Judge Partridge.

Dated Los Angeles, Cal., August 30, 1924.

RAYMOND IVES BLAKESLEE,
J. CALVIN BROWN,

Solicitors for Plaintiffs-Appellees.

Filed Aug. 30, 1924. [162]

[Endorsed]: No. 4420. United States Circuit Court of Appeals for the Ninth Circuit. Angelus Sanitary Can Machine Company, a Corporation, and Henry L. Geunther, Appellants, vs. Ray O. Wilson, Arthur D. Sumner, Franklin F. Stetson and Los Angeles Can Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Received November 20, 1924.

F. D. MONCKTON,
Clerk.

Filed December 5, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

DEFENDANT'S EXHIBIT "N-3."

[Endorsed]: No. F-72—Eq. U. S. Dist. Court, So. Dist. of Cal., So. Div. Wilson vs. L. A. Sanitary Can Co. Pltfs. Exhibit No. 3. Filed January 4, 1923. C. C. Montgomery, Special Master. J. P. D.

Filed Dec. 27, 1923. Chas. N. Williams, Clerk. By L. J. Cordes, Deputy Clerk.

No. 4420. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 5, 1924. F. D. Monckton, Clerk.

1914

Div. 14 (Ex'r's Book) 16-266

Number (Series of 1900),

856,117

Patent No. 1203295

Name—Ray O. Wilson and Arthur D. Sumner,

Assors. of 30% to said Wilson, 30% to said

Sumner and 40% to F. F. Stetson, of Los

Angeles, Cal.

191—

of Los Angeles,

County of—

State of California.

Invention—Can Heading Machines.

Division of App., No. _____, filed

Original	Renewed	
Petition—	Aug. 10, 1914	, 191
Affidavit—	“ “, 1914	, 191
Specification—	“ “, 1914	, 191
Drawing—9 shts.	“ “, 1914	, 191
Photo Copy	, 191	, 191
First Fee Cash \$15	Aug. 10, 1914	, 191
“ “ Cert	, 191	, 191
Appl. filed complete	Aug. 10, 1914	, 191
Examined and Passed for Issue	Feb. 4, 1916	, 191
H. P. Gerald, Actg. Exr. Div. 14 Exr. Div.		
Notice of Allowance	Feb. 5, 1916	, 191
By Commissioner. By Commissioner.		
Cert		
Final Fee Cash, dated	Aug. 4, 1916	, 191
“ “ Cert \$20	Aug. 9, 1916	, 191
Patented (Dissolved)	Oct. 31, 1916	, 191

PARTS OF APPLICATION FILED

Attorney—~~Hazard & Strause,~~

639 Citizen's Natl. Bk. Bldg.

R. S. BERRY, 506 Central Bldg.,

Los Angeles, Calif.

Associate Attorney

(No. of Claims Allowed 18) Title as Allowed—

Can Heading Machine.

.....(Cl. 113-14)

[Letterhead of Hazard & Strause.]

7655

Serial No. 856,117. Paper No. 1

Application.

U. S. Patent Office.

Aug. 12, 1914.

Division 14.

PETITION AND POWER OF ATTORNEY.

To the Honorable Commissioner of Patents:

Your Petitioners Arthur D. Sumner, whose post office address is 808 West Avenue 50, Los Angeles, California, and Ray O. Wilson whose P. O. address is 1022 Eagle Rock Drive, Los Angeles, California, & citizens of the United States, residing at Los Angeles, in the County of Los Angeles and State of California, prays that letters patent may be granted to ~~him~~ them for the improvement in CAN HEADING MACHINES set forth in the annexed specifications, and they hereby appoint the firm of HAZARD & STRAUSE, whose register number is 8053, the individual members of which firm are Henry T. Hazard and Edmund A. Strause, of 639 Citizens National Bank Building, Los

Angeles, California, his attorneys with full power of substitution and revocation to prosecute this application, to make alterations and amendments therein, to receive the patent and to transact all business in the PATENT OFFICE connected therewith.

(Sign Here)  RAY O. WILSON,
ARTHUR D. SUMNER.

SPECIFICATION:

To All Whom It May Concern:

Be it known that

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We, Ray O. Wilson and Arthur D. Sumner, both citizens of the United States, residing at Los Angeles, in the county of Los Angeles, State of California, have invented new and useful Improvements in Can-Heading Machines, of which the following is a specification.

This invention relates to a can heading machine, and particularly pertains to a mechanism for double seaming the ends or caps on metal cans.

It is the object of this invention to provide a can heading machine for placing the bottom ends on cans in the manufacture of the same and for double seaming the covers on the cans after the materials to be contained in the can have been placed therein, and the particular object is to provide a machine of this character which is continuous in operation, that is, in which the can is conveyed continuously through the machine in the

heading operation without stop and start movements.

A further object is to provide a can heading machine which, by reason of a continuous and non-intermittent progress of cans there through, is capable of a more rapid and consequently larger output that is effected by most can heading machines now generally in use.

A further object is to provide a can heading machine in which a large number of cans will be operated on simultaneously and advanced continuously through the machine without interruption.

A further object is to provide a can heading machine which is compact so as to occupy small floor space and in which the parts are so arranged as to be readily accessible for removal, repairs or adjustment.

A further object is to provide means for feeding the ends of the cans to the can bodies and to provide means whereby the can body and the top therefor are delivered simultaneously to the primary seam forming mechanism.

A further object is to provide a seaming mechanism

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ism by which the joints between the can body and ends will be effectively sealed by spinning the contiguous edges of the can body and can-top together in a double seam, and which is effected whilst the can is advancing through the machine.

The invention is illustrated in the accompanying drawings, in which:

Figure 1 is a plan view of the can heading machine with end portions thereof broken away. Fig. 2 is a side elevation of same. Fig. 3 is a vertical section on the line 3-3 of Fig. 2, as seen in the direction indicated by the arrows. Fig. 4 is a vertical section on the line 4-4 of Fig. 2, as seen in the direction indicated by the arrows. Fig. 5 is a horizontal section on the line 5-5 of Fig. 2, illustrating the driving gears and indicating by arrows the direction of rotation of same. Fig. 6 is a horizontal section on the line 6-6 of Fig. 2, showing the can advancing mechanism. Fig. 7 is a detail in elevation of one of the stationary cam disks showing the formation of the cam groove on the periphery thereof, as seen on the line 7-7 of Fig. 6 in the direction indicated by the arrows. Fig. 8 is a diagrammatic view illustrating the movements of the can and the actions thereon during the double seaming operation. Fig. 9 is an enlarged detail section on the line 9-9 of Fig. 2, partly in elevation showing a can in position on the final double seamer. Fig. 10 is an enlarged detail vertical section on the line 10-10 of Fig. 2, illustrating the can in position on the initial seamer. Figs. 11, 12 and 13 are details in section of the initial seamer illustrating the manner in which the primary seam is formed between the can body and head. Figs. 14 and 15 are detail sections illustrating the manner

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of forming the initial seam on the can by the mechanism illustrated in Figs. 11, 12 and 13. Figs. 16, 17 and 18 are views illustrating the final seaming operation on the can and showing the method for effecting same. Fig. 19 is an enlarged detail showing the double seam between the can head and body as completed by the mechanism shown in Figs. 16, 17 and 18. Fig. 20 is an enlarged detail in plan of the can top seaming mechanism. Fig. 21 is a section and elevation on the line 21-21 of Fig. 20 illustrating the can tops as normally positioned in the can top feeding device. Fig. 22 is a vertical section on the line 22-22 of Fig. 21 showing a can top as delivered from the can top feeding mechanism. Fig. 23 is a detail section on the line 23-23 of Fig. 20, showing a can top positioned on the supporting plate at one side thereof.

More specifically, 25 indicates the stationary bed or base of the machine, which may be of any suitable construction, and which forms the main support of the various portions of the machine. Mounted in suitable bearings on the base 25 is a drive shaft 26 (reference being had to Fig. 5) which is fitted with a belt pulley 27 at one end thereof from which it may be rotated continuously from any suitable source of power; the opposite end of the drive shaft 26 being provided with a hand wheel 28 by means of which it may be rotated

manually when it is desired to adjust the positions of the various parts controlled thereby when the

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machine is not in operation.

Mounted on the drive shaft 26 is a beveled pinion 29 meshing with a corresponding pinion on the underside of a spur gear 30, which in turn meshes with an idler gear 31 meshing with a large gear 32 mounted on a vertically extending tubular shaft 33; the gears 30 and 31 constituting speed reduction gears. A second beveled pinion 34 is mounted on the drive shaft 26 and meshes with a beveled gear 35 mounted on a shaft 36 which extends upwardly through the tubular shaft 33. Meshing with the gear 32 on one side thereof is a gear 37 on a vertical shaft 38 and meshing with the gear 32 on the side opposite the gear 37 is a gear 39 on a shaft 40, which gear 39 also meshes with a large gear wheel 41 on a shaft 42. A gear wheel 43 of a diameter slightly less than that of the gear wheel 41 meshes with the latter and also with a smaller gear 44; the gear 43 being mounted on a shaft 45 and the gear 44 on a shaft 46.

The tubular shaft 33, shaft 40 and shaft 42 extend upwardly through bearings 47, 48 and 49 carried by brackets 50, 51 and 52 respectively carried on an elevated portion of 53 of the base 25, and the shafts 38, 45 and 46 are carried upward

through suitably mounted bearings. The shaft 46 extends above a can receiving and feeding table 54 which is secured to the shaft 46 and revoluble therewith, and rigidly mounted on the upper end of the shaft 46 is a pair of curved can engaging arms 55 extending on opposite sides of the sides of the shaft 46 adjacent the surface of the revoluble table 54. The shaft 45 has a horizontally extending can feeding wheel 56 mounted thereon which wheel is arranged immediately above the table 54 and is formed with a plurality of can receiving pockets 58 on its vertical edge which pockets are approximately semi-cylindrical and are adapted to engage the sides of cans fed thereto by means of the arms 55; the wheel 56 and the arms 55 being rotated in opposite directions and at such speeds in relation to each other that a can advanced by an arm 55 will be moved into a pocket 58 on the wheel 56 and carried around to the initial seam forming

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mechanism later described. A curved guide rail 59 is arranged concentric with the wheel 56 and spaced therefrom and is adapted to engage the outer portions of the cans to maintain them in position in the pockets 58 as the wheel 56 revolves; this guide rail extending approximately half way around the wheel 56 on a plane below the upper face of the latter.

Means are provided for automatically feeding the can-tops to the cans as they are advanced by the wheel 56, which means is particularly illustrated in Figs. 20, 21 and 22, and includes a series of four upright guide members 60 arranged on the corners of a rectangle and between which the can-tops are arranged in a stack; the guide members 60 being carried on horizontally-extending slotted plates 61 supported on brackets 62 and adapted to be rigidly secured to the latter by means of bolts 63 which pass through the slots in the plates 61; the plates 61 being adapted to be adjusted to position the guide members 60 to accommodate can-tops -a- of various diameters and to position them in proper relation to the cans advanced by the wheel 56. The brackets 62 are carried on a standard 62' shown in Fig. 22. The guide members 60 are so arranged as to dispose the can-tops stacked therebetween immediately over the pockets 58 on the wheel 56 so that when a can-top is discharged from the stack, as will presently be described, it will be deposited immediately above a can being advanced by the wheel.

~~The can tops -a- are supported between the guide members 60 by means of a plate 64 which engages one edge of the lowermost can top which also rests on its opposite sides upon a pair of spaced supporting plates 65 and 66, as particularly shown in Figs. 22 and 23; each can-top -a- being formed with a depressed portion -b- which is adapted to seat on the supporting plates 65 and 66.~~

The plates 65 and 66 are mounted on the undersides of the brackets 62 above the wheel 56 and the guide rail 59; the plate 65 connecting with the curved guide rail 59' arranged above the guide rail 59 with its upper face flush with the underside of the lower wall of a groove 67 formed on the inner

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face of the guide rail 59', and the plate 66 connects with a curved rail 68 having a groove 69 on its inner face and arranged concentric with the curved rail 59' on a plane therewith. The grooves 67 and 69 are designed to receive peripheral flanges -e- formed on the can-tops -a- to support the can-tops clear of the cans -d- as the latter are advanced by the wheel 56. The plate 64 is mounted on a curved arm 70 pivoted at 71 on a lug on the bracket 62; the outer end portion of the arm 70 being curved inwardly beneath the rail 59 to extend in the path of travel of the can advanced by the wheel 56 in such manner that the can will operate to rock the arm 70 on its pivot 71 to withdraw the plate 64 out of engagement with the lower can-top -a- and cause the latter to drop and be supported solely on the plates 65 and 66. The arm 70 will be moved by the action of the can as indicated in dotted lines in Fig. 20 and will be restored to its normal position by means of a spring 72; the plate 64 on returning to its normal position engaging the flange

-c- of the can top -a- arranged immediately above the can top previously dropped onto the plates 65 and 66. The forward edge of the plate 64 is formed with an inclined face which on engaging the edge of the can-top will act to slightly elevate that edge of the can-top so that can-top engaging members 73 carried by the wheel 56 will clear the can-top supported on the plate 64 and will engage the lowermost can-top supported on the plates 65 and 66.

The can-top engaging members 73 comprise outwardly and upwardly projecting fingers mounted on the upper edge of the wheel 56 to one side of the pockets 58; a can-top engaging member 73 being mounted at the upper outer edge of each pocket 58 as shown in Fig. 1, and operating when the wheel 56 is revolved, when a can is positioned in the pocket 58 to actuate the lever 70, to engage the can-top released by the plate 64, and advance the can-top along the grooves 67 and 69 formed in the rails 59' and 68 respectively. The can tops will thus be advanced with the wheel 56 directly

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above the cans in the pockets 58 and will be spaced therefrom by reason of the can-tops being supported on the rails 59' and 68 above the outer edge of the wheel 56, and above the top of the cans; the cans -d- being supported on an upwardly in-

clined rail 74 extending beneath the outer edge of the wheel 56 on the path of travel of the cans carried by the latter, and terminating at its lower end adjacent the table 54. The can-tops are thus supported clear of the contents of the cans which, frequently project above the upper edges of the cans, the cans, however, being gradually moved upward toward the can-top as it is advanced along the upwardly inclined can supporting rail 74 until the can and the top therefor are discharged from engagement with the wheel 56, as will presently be described.

Rigidly mounted on the shaft 42 is a collar 75 on which a series of four radiating brackets 76 are formed and on the outer ends of which brackets sleeves 77 are mounted, which sleeves form guides for vertically reciprocal stems 78, the lower ends of which are fitted with rollers 79 extending into a cam groove 80 formed on an annular flange 81 formed on the base 25 and encircling the shaft 42 concentric therewith. Each of the stems 78 is formed with an internally threaded bore 82 to receive a threaded stud 83 adapted to be adjusted vertically in relation to the stem and on which stud

rotably

a collar 84 is ~~rigidly~~ mounted. The collar 84 is

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formed with an annular flange Λ intermediate its forming a chuck

ends and has a disk 86 Λ on its upper end; the disk 86 being formed with an annularly depending flange 87 adapted to slidably engage the

upper end of the collar 84. Depending bolts 88 on the disk 86 pass through apertures in the flange 85 and are formed with heads 89 which are adapted to engage the underside of the flange 85

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D'

to limit the upward movement of the disk 86. A D' A coiled spring 90 is interposed between the disk 86 and the flange 85 to normally maintain the disk 86 in its uppermost position and to provide a resilient seat therefor. The upper faces of the disks 86 are arranged on a plane with the upper end of the inclined rail 74 which terminates adjacent the path of travel of the outer edges of the

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disks 86 as the latter are advanced on the rotation of the shaft 42.

Rigidly mounted on the upper end of the shaft 42 is a cross head 91 comprising a series of radiating arms carrying sleeves 92 in which vertical tubular spindles 93 are revolvably mounted. A series of four of these spindles 93 and their bearings 92 are provided and on the lower end of each spindle 93 is a pinion 94 which meshes with a fixed gear 95 rigidly mounted on the bearing 49. Mounted on the underside of each pinion 94 and secured to the spindle 93 is a disk 96 which is formed with an outwardly extending flange 97 on its outer edge to receive a ring 98 which is slidable on the flange

97 and is normally disposed concentric with the disk 96 and the spindle 93 by means of a spring pressed ball 99 adapted to seat in an annular channel 100 formed on the upper face of the ring 98; a socket 101 being formed in the pinion 94 to receive the ball 99 and a pair of washers 102 between which a spring 103 is interposed.

A set screw 104 is mounted in the pinion 94 and bears against the upper washer 102 and is adapted to be adjusted so as to vary the tension of the spring 103.

The ring 98 is formed with an annular groove 105 on an offset portion of its inner wall, the lower edge of which groove is formed by a flange 106 having an outwardly diverging lower face. This ring 98 constitutes an initial seaming device and is designed to be normally disposed immediately above the can receiving disk 86 so as to engage the top of the can supported on the disk 86, as particularly shown in Fig. 10; a seaming ring 98 being positioned over each of the disks 86. The disk 96 is adapted to engage the top -a- of the can as particularly shown in Figs. 12 and 13, and operates to rotate the can when the gear 94 is revolved by being carried around the stationary gear 45 on the rotation of the shaft 42.

The rings 98 are adapted to be actuated on the rotating of the cross head 91 to engage the flanges -c- on the can covers -a- and turn a lip -e- on the

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flange -c- beneath an annular flange -f- on the top of the can, as shown in Figs. 14 and 15. The actuation of the rings 98 is effected by means of a cam disk 107 rigidly mounted on the underside of the stationary gear 95; the cam disk 107 having an arcuate face eccentric to the center of the shaft 42 on which the outer faces of the seaming rings 98 are adapted to bear, when performing the seam forming operation and having a concentric arcuate face which engages the rings as the gears 94 are rotated to position the rings concentric with the gears 94. When thus disposed they are engaged by the centering balls 99 so that the rings will be positioned concentric with the cans when the latter are fed to the disks 86 from the can feeding wheel 56. The disks 86 and the cross head 91 form a carriage for advancing the cans, which on being carried around by the rotation of the shaft 42 receive the initial seaming operation just described and as shown in Figs. 14 and 15, and are then subjected to a second operation, being delivered from the can receiving disks 86 to a platform 108 by means of an arm 109 mounted on the shaft 40; the arm 109 having a semi-circular end portion 109' adapted to engage the cans on the disks 86 and remove them from the latter. In order to permit the removal of the cans from the disks 86 the latter are moved downwardly by the action of the cam groove 80 on the flange 81 which allows the stems 78 to gravitate downward and withdraw the upper

end of the cans on the disks 86 clear of the seaming ring 98.

The can engaged by the arm 109 is advanced over the platform 108 and is delivered to a disk 110 reciprocally rotably mounted on a stud 112. A mounted on a collar 111 is carried by a threaded stem 112 on a reciprocal stem 113 having a roller 114 on its lower end engaged in a cam groove 115 on a flange 116 carried by the base 25 and formed concentric with the shaft 33. A series of four of the disks 110 and their mountings are provided and the stems 113 are slidably engaged by sleeves 117 carried on brackets 118 secured to the tubular shaft 33.

Mounted on the upper end of the tubular shaft 33 is a cross head 119 having a series of sleeves

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120 forming bearings for tubular spindles 121 on the lower ends of which disks 122 are rigidly mounted; a disk 122 being disposed above each of the can receiving disks 110 and adapted to engage the tops of the cans delivered to the disks 110. The tubular shafts 121 are provided with gears 123 which mesh with a large gear 124 mounted on the shaft 36 extending through the tubular shaft 33. The shafts 33 and 36 are designed to be rotated in opposite directions so that the speed of rotation of the spindles 121 will be increased without the

use of an excessively large gear 124 or reduced pinions 123.

The cans carried around by the disks 110 and 122 are designed to be subjected to the action of ordi-
compressing

nary double seaming rollers 125 formed with annular grooves 126 thereon adapted to engage the seams on the upper edges of the cans as shown
compressing

in Fig. 19. The double seaming rollers 125 are mounted upon bell crank lever arms 127 pivoted at 128 to the cross head 119; the bell crank arms 127 being provided with wheels 129 adapted to traverse a cam disk 130 rigidly mounted on the bearing 47; the cam disk 130 having an eccentric cam face by which the bell crank arms 127 are rocked to gradu-
compressing

ally increase the pressure of the can seaming rollers 125 on the can seam and crowd the seam against the disk 122 as the can is rapidly revolved by the latter, and thereby complete the seaming operation.

after

The cans ~~on~~ being subjected to the action of the
compressing
seaming rollers 125 are ejected from the disks 110 by means of arms 131 mounted on the shaft 38 and adapted to engage the can bodies and shove them off the can supporting disks 110 onto a suitable conveyor, not shown; the disks 110 moving into a lower position when the cans are engaged by the arms 131 so as to move the heads of the cans clear

of the disks 122. The downward movement of the disks 110 is effected by the rollers 114 on the stems 113 moving downward in the cam groove 115 on the flange 116.

As a means for insuring the release of the cans from the disk 122 and the disks 96, stems 132 and 133 are mounted in the tubular shafts 121 and 93

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respectively; the lower ends of the stems 132 and 133 being formed with shoulders 134 and 135 which are engaged by springs 136 and 137 supported upon inturned flanges on the lower ends of the shafts 121 and 93.

The springs 136 and 137 operate to normally maintain the stems 132 and 133 in an uppermost position with the lower ends of the stems above the lower faces of the disks 122 and 96 and out of contact with the can-top engaged by the disk. These stems 132 and 133 are designed to be depressed in opposition to the springs 136 and 137 to force the cans out of engagement with the disks 122 and 96 the moment the can supporting disks 110 and 86 are lowered by the action of the cam groove 115 and 180 on the rollers 114 and 79. The depression of the stems 132 and 133 is accomplished by means of stationary arms 138 and 139 mounted on standards carried by the base portion 53 which arms project in the path of travel of the upper ends of the

stems 132 and 133 at points immediately above the points where the can supporting disks 110 and 86 are lowered in such manner that the stems 132 and 133 will be engaged by the arms 138 and 139 and thereby be suddenly depressed so as to impact against the head of the can.

The upper ends of the stems 132 and 133 project a short distance above the upper ends of the tubular shaft 121 and 93 and are formed with heads 140 and 141 respectively which have crowned upper faces which are engaged by curved lower faces on the arms 138 and 139.

As a means for permitting a slight relative movement of the arms of the bell crank arms 127 carrying the seaming rollers 125 and the cam engaging wheels 129 to permit the seaming rollers 125 to pass over the joint in the sides of the can body the arms 142 carrying the wheels 129 are formed of a resilient metal such as steel having sufficient rigidity to insure a proper seaming action of the rollers 125 but which will yield when subjected to the pressure thereon caused by the seaming rollers 125 passing over the can seam. To permit adjustment of the rollers 125 and the wheels 129 in relation to each

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other to accommodate them to cans of different diameters the arms carrying the rollers 125 are constructed to be adjusted to various angles in relation to the arms 142. To effect this adjustment, said arms are mounted separately on the pivot pins

128 and are formed with overlapping flanges 143 adapted to be secured together with the arms in a desired angular position in relation to each other by means of pins 144 extending through an aperture in the uppermost flange and adapted to engage any one of a series of apertures 145 formed in the lowermost flange on an arc of a circle concentric with the pivot pin 128.

In the operation of the invention, the drive shaft 26 is rotated continuously from any suitable source of power, thus effecting a continuous rotation of the shafts 33, 36, 38, 40, 42, 45 and 46 through the medium of the gears 29, 30, 31, 32, 34, 35, 37, 39, 41, 43 and 44, which are rotated in the directions indicated by the arrows in Fig. 5. This effects a continuous rotation of the arms 55 on the shaft 46, can feeding wheel 56 and shaft 45, the brackets 76 and cross head 91 on the shaft 42 carrying the primary seam forming mechanism, the arms 109 on the shaft 40, the brackets 118 and cross head 119 on the tubular shaft 33 carrying the final seaming mechanism, the gear 124 on the shaft 36 for accelerating the gears 123, and the arms 131 on the shaft 38.

It will now be seen that a can fed to the arms 55 will be advanced continuously during its travel through the machine and by reason of no intermittent movement of the can or the rotating parts conveying same that the can may be passed through the machine and subjected to the heading action thereof at a high speed, thus producing a machine that is capable of a rapid output.

The operations on the can are as follows: On its being engaged by the arms 55 it is advanced into

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a pocket 58 on the wheel 56 and carried around by the latter into the passage inside of the guide rail 59. The body of the can on striking the arm 70 rocks the latter on its pivot 71 and moves the plate 64 from beneath a can-top -a- so that the forward edge of the latter will drop as before described into the path of travel of the finger 73 on the wheel 56 at the rear edge of the pocket 58 carrying the can. The finger 73 will then carry the can-top -a- into the grooves 67 and 69 on the rails 59' and 68 with the can-top positioned directly above the can.

The can is supported on the inclined rail 74 and is moved by the wheel 56 into position over a can supporting disk 86 which is moved beneath the can by the rotation of the shaft 42 at a speed corresponding to that of the can; the can and the disk 86 registering coincidentally when alined between the shafts 42 and 45. The disk 86 is then elevated by the action of the cam groove 80 on the roller 79, thereby causing the disk 86 to engage the lower end of the can and raise it into engagement with the can-top thereabove; the movement of the disk 86 being sufficient to carry the can-top into engagement with the disk 96. Sufficient pressure is exerted on the can between the disk 86 and the disk 96 that the rotation of the latter will operate to spin the can as it is advanced with the disk 86 and carried

out of the pocket 58 on the wheel 56. While the can is being thus spun the seam forming ring 98 will be actuated by the cam 107 and moved into engagement with the lip -e- and flange -c- on the can-top so as to bend the lip -c- beneath the flange -f- on the upper edge of the can body as shown in Fig. 15. The can will then be discharged from the

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disk A ~~36~~ as before described and conveyed by the rotating arms 109 onto a disk 110 where it is engaged by the rapidly rotating disk 122 and spun whilst being advanced by the rotation of the shaft 33. The seaming roller 125 will then be caused to press against the seam between the can-top and can

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body by the action of the cam 130 as previously described, during a partial revolution of the shaft 33; the can being spun rapidly a number of revolutions during this action. On completion of this operation the can will be ejected from the disk 110 by the arm 131, as before described, with the can-top effectively secured thereto.

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What we claim is:

~~1. In a can heading machine, a continuously re-~~
 per A
 Sub. C3
 per D
 voluble can conveying carriage, means on said car-
 encircling and
 riage for A forming a double seam between a can
 top and can body carried thereon, a second continu-
 ously revoluble can conveying carriage, means on
 said second carriage for rolling the seam formed
 on the first carriage, and means for automatically
 passing the can from the first carriage to the second
 carriage.

~~2. In a can heading machine, a pair of continu-~~
 per A
 per D
 ously revoluble can conveying carriages, means for
 delivering cans and can-tops coincidently to one of
 encircling and
 said carriages, means A operating on the can and
 can-top on the last named carriage, whereby the
 per C
 can-top and can are joined by a double seam, means
 for delivering the cans from one carriage to the
 other, and means on the other carriage for rolling
 the seam between the can-top and can body whilst
 and means on each said carriage for revolving the can in rotation thereto.
~~being advanced by the said carriage A.~~

“ C
 3. 1. In a can heading machine, a continuously
 revoluble member, a series of spindles thereon, disks
 on said spindles, means for rotating the spindles
 by the rotation of the revoluble member, means for
 clamping a can-top and can against each of the

disks to cause the cans to rotate as they are ad-
 encircling and
 vanced by the revoluble member, means Λ forming
 e

a seam between the can-top and can whilst it is be-
 ing advanced a partial revolution of the revoluble
 member, means for automatically removing the can
 from the revoluble member, continuous can advanc-
 ing means adapted to receive the cans from said
 removing means, and means for rolling the seam be-
 tween the can-top and can while it is being ad-
 vanced continuously.

~~4. In a can heading machine, a pair of continu-
 ously revoluble can conveying members, means for
 feeding cantops and cans continuously to one of
 encircling and~~

~~said members, means for Λ connecting the can-tops
 to the cans during a partial revolution of the re-
 voluble member, means for transferring the cans~~

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~~continuously from one revoluble member to the
 other, and means actuated by the other revoluble
 member for rolling the seams between the can tops
 and cans.~~

~~5. In a can heading machine, a pair of continu-
 ously revoluble carriages, vertically reciprocal can
 supporting means thereon, means for delivering can
 tops and cans continuously to the can supporting
 means on one of said carriages, means for deliver-~~

means for rotating the cans on said (carriages) in relation thereto
ing the cans from one carriage to the other Λ and

operable the cans

means ~~controlled~~ Λ by the rotation of Λ said car-
riages for forming a double seam between the can-
tops and cans.

2. 6. 4. In a can heading machine, a revoluble
carriage, vertically reciprocal can supporting means
on said carriage, means for coincidently delivering
can-tops and cans to the can supporting means while
encircling the can top
the carriage is rotating, means Λ for forming seams

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between the can tops and cans whilst they are ad-
vancing on a partial revolution of the carriage, a
second revoluble carriage, means for supporting
cans on said second carriage, means for transfer-
ring the cans from the supporting means on one
carriage to the supporting means on the other car-
riage, and means controlled by the rotation of the
second carriage for rolling the seam formed be-
tween the can-tops and cans on the first carriage.

3. 7. 5. In a can heading machine, a pair of
revoluble shafts, means for rotating said shafts con-
tinuously, a series of sleeves carried by each of said
shafts, stems reciprocally mounted in said sleeves,
means for reciprocating said stems on the rotation
of the shafts, can supporting means carried by said
stems, cross heads carried by said shafts, spindles
revoluble mounted in said cross heads in alinement
encircling and

with the reciprocal stems, can-top Λ engaging disks

on said spindles, means for delivering can-tops and cans continuously between the supporting means and the disks carried by one of said shafts, means on said disks

Λ for forming seams between the can-tops and cans as they are advanced by a partial revolution of said

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last named shaft, means for automatically transposing the cans from the supporting means carried by one shaft to the supporting means carried by the other shaft, and means controlled by the rotation of the second shaft for rolling the seams between the can-tops and cans.

~~8.6. In a can heading machine, feeding device for delivering cans and can-tops coincidently to a seaming mechanism comprising a continuously revoluble wheel formed with can receiving depressions on its periphery, a rack adapted to receive a stack of can-tops, a pair of curved rails arranged above the wheel on each side of the edge thereof, means controlled by a can being advanced by the wheel for~~

~~a finger~~

~~delivering a can-top to the grooved rails, and Λ means on the wheel for engaging the delivered can-top and conveying it on the rails directly above the can carried by the wheel.~~

9. In a can heading machine, the combination of a vertically extending shaft, a cross head on said shaft, a series of spindles carried on said cross head, ~~pinions on said spindles, a stationary gear with~~

~~which said pinions intermesh, seam forming means~~
 carried by said pinions, a series of vertically re-
 cipocal can supporting means carried by said shaft
 and arranged beneath the seam forming means,
 means for rotating the shaft continuously, means
 for feeding cans and can-tops to the can supporting
 means whilst the latter are being advanced by ro-
 tation of the shaft, means for reciprocating the can
 supporting means whilst the latter is advanced to
 move the cans thereon in and out of engagement
 with the seam forming means during a partial revo-
 lution of the shaft, and means for automatically re-
 moving the cans from the supporting means.

10. In a can heading machine, a vertically ex-
 tending shaft, means for rotating said shaft con-
 tinuously, a cross head on said shaft, a series of
 vertical spindles carried on said cross head, pinions
 on said spindles, a stationary gear with which said
 pinions intermesh, seam forming means on said
~~pinions, can supporting means carried by said shaft~~

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~~and arranged beneath the seam forming means,~~
 means for feeding cans and can-tops to the can sup-
 porting means whilst the latter are advancing, means
 for reciprocating the can supporting means to move
 the cans thereon in and out of engagement with the
 seam forming means during a partial revolution of
 the shaft, comprising stems carrying the can sup-
 porting means, and a cam encircling the shaft

~~adapted to engage and reciprocate said stems, and means for automatically removing the cans from the supporting means.~~

11. In a can heading machine, the combination of a pair of parallel vertically extending shafts, a cross head on each of said shafts, a series of spindles carried on said cross head; pinions on said spindles, gears with which said pinions intermesh, seam forming devices carried on one set of the pinions; seam rolling means comprising disks on the spindles carrying the other set of pinions, and rollers on the cross head carrying the last named spindles; verti-

disk

cally reciprocal can supporting ~~Λ means~~ mounted on each of the shafts, means for rotating said shafts continuously, means for feeding can tops and cans to the supporting disk on one shaft, means for automatically transferring the cans from said supporting disks to the other supporting disks whilst the shafts are rotating and said disks are being advanced, and means operating on both sets of supporting disks, whereby the latter are reciprocated to move the cans thereon in and out of operative connection with the seam forming and rolling devices during a partial revolution of the shafts. —

4. 12. 7. In a can heading machine, a pair of parallel vertically extending shafts one of which is tubular, means for rotating said shafts continuously in corresponding directions, a third shaft extending through the tubular shaft adapted to be rotated in a reverse direction in relation to said tubular shaft, a gear mounted on the third shaft, a cross head on

the tubular shaft, a series of spindles on said cross head, pinions on said spindles meshing with the

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gear on the third shaft, can top engaging means on said spindles, seam rolling means carried by said cross head coöperating with the can top engaging means to roll the seams between the can tops and can bodies as they are spun by the rotation of said spindles during a partial revolution of the tubular shaft, means for supporting the cans to position the tops in operative relation to the seam rolling means, means on the other shaft for forming a seam between the can top and can body during a partial revolution of the shaft and while it is in motion, and means for transferring the cans from the seam forming means to the seam rolling means.

A

Insert A'

Cls 5-18

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In witness that we claim the foregoing we have hereunto subscribed my name this 1st day of July, 1914.

RAY O. WILSON,
ARTHUR D. SUMNER,

Inventor.

Witnesses:

T. E. MONTEVERDE,
MARGUERITE BATES.

OATH.

State of California,
County of Los Angeles,—ss.


ARTHUR D. SUMNER and RAY O. WILSON,
the above-named petitioners, being duly sworn, deposes and says that they are citizens of the United States and residents of Los Angeles, in the County of Los Angeles, State of California, and that they verily believes themselves to be the original, first, and joint inventors of the improvements in

CAN HEADING MACHINES.

described and claimed in the annexed specifications; that they do not know and do not believe that the same was ever known or used before their invention or discovery thereof; or patented or described in any printed publication in any country before their invention or discovery thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented to them or to others with their knowledge or consent in this or any foreign country for more than two years prior to this application, or on an application for a patent filed in any country foreign to the United States by them or their legal representatives or assigns more than twelve months prior to their application; and that no application for patent on said improvement has been filed by them or their

150 *Angelus Sanitary Can Machine Co. et al.*

representatives or assigns in any country foreign to the United States.

(Applicant sign here)  RAY O. WILSON.
ARTHUR D. SUMNER.

Impression seal here.

Sworn and subscribed to before me this 1st day of July, 1914.

(Signature of officer administering oath)

MARIE BATTEY,

Notary Public in and for the County of Los Angeles,
State of California.

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Div. 14 Room 309

Address only

"The Commissioner of Patents,
Washington, D. C.,"
and not any official by name.

Paper No. 2

All communications respecting this application should give the serial number, date of filing, title of invention, and name of the applicant.

DEPARTMENT OF THE INTERIOR.

UNITED STATES PATENT OFFICE.

I. L. T.

Washington.

February 13, 1915.

Hazard & Strause,
639 Citizens' Nat'l Bank Bldg.,
Los Angeles, Calif.

Please find below a communication from the EXAMINER in charge of the application of Wilson

& Sumner; Serial No. 856,117; filed August 10, 1914; for Can Heading Machines.

THOMAS EWING,
Commissioner of Patents.

This case has been examined.

As too long a time has elapsed between the execution of the oath and the filing of this case, a new oath is required.

Claims 1, 3, 4, 5, and 6 are rejected on 813,482, February 27, 1906, Brenzinger, Class 113-24, in view of 858,785, July 2, 1907, Black, Class 113-14.

Claims 2 and 7 are rejected on the same references as claims 1 etc., taken with 1,104,751, July 21, 1914, Wegner, Class 113-14.

Claim 8 is rejected on 1,074,325, September 30, 1913, Johnson, Class 113-14.

Claims 9, 10, 11 and 12 are rejected on the same references as Claims 1 etc., taken with 492,076, February 21, 1893, Walsh, Class 113-14.

Fuchs

3d

L. W. MAXSON,
Examiner.

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Serial No. 856,117

Paper No. 3

Pow. of Atty.,

REVOCATION OF POWER OF ATTORNEY.

To the Commissioner of Patents:

The undersigned having, on or about the 1st day of August, 1914, appointed Hazard and Strause, of

Los Angeles, in the County of Los Angeles and State of California, his attorney to prosecute an application for letters patent, which application was filed on or about the 10th day of August, 1914, for an improvement in

CAN HEADING MACHINES—S. N. 856117, hereby revokes the power of attorney then given, and appoints R. S. Berry of 506 Central Building, Los Angeles, in the county of Los Angeles and State of California, and whose register number is 8111, his attorney, with full power of substitution and revocation, to prosecute said application, to make alterations and amendments therein, to receive the patent, and to transact all business in the Patent Office connected therewith.

Signed at Los Angeles, in the county of Los Angeles, State of California, this 23d day of February, 1915.

ARTHUR D. SUMNER,

RAY O. WILSON,

[Twenty-five Cents U. S. Internal Revenue Stamp attached.]

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U. S. Patent Office.

7676.

June 15, 1915.

Paper No. 3.

Division 14.

Serial No. 856,117. Paper No. 4.

Amend't A & New Oath.

Los Angeles, California, June 7, 1915.

Div. 14, Room 309,

Wilson & Sumner,

CAN HEADING MACHINES,

Serial No. 856,117,

Filed August 10, 1914.

Commissioner of Patents,

Washington, D. C.

Sir:

In response to the office action of February 13, 1915.

Insert encircling and as follows:

Claim 1 line 2 before "forming"; claim 2 line 3 before "operating"; claim 3 line 6 before "forming"; claim 4 line 3 before "connecting"; claim 7 line 7 after "can top."

Claim 5 line 5 after "other" insert means for rotating the cans on said carriages in relation thereto.

Change "controlled" to operable.

Line 6 erase "said carriages" and insert the cans.

Claim 6 line 4 before "for" insert encircling the can top.

Claim 8 line 7 erase "means" and insert a finger.

Reconsider claims 9-12, inclusive.

Insert the following claims:

5. 8. 13. In a can heading machine, a continuously revoluble can conveying carriage, means movable with said carriage adapted to encircle and form a double seam between a can top and can body, means for spinning the can when encircled by the seaming means, a second continuously revoluble can conveying carriage, means on said second carriage for rolling the seam formed on the first carriage, and means for automatically passing the can from the first carriage to the second carriage.

9. 6. 14. In a can heading machine, a continuously revoluble can conveying carriage, means movable with said carriage adapted to encircle and form a double seam between a can top and can body, means for spinning the can when encircled by the seaming means, a second continuously revoluble can conveying carriage, means on said second carriage for rolling the seam formed on the first carriage, means for spinning the can during the seam

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Paper No. 3.

June 7, 1915.

S. N. 856,117.

rolling operation, and means for automatically passing the can from the first carriage to the second carriage.

10. 7. 15. In a can heading machine, a pair of

rotary carriages, means for delivering cans and can tops continuously to one of said carriages, means on said last named carriage for encircling the can tops and cans to form a double seam, means for spinning the can and can top cooperating with said last named means, whereby the double seam is formed while the can is being advanced, means for conveying the can from one carriage to the other, seam rolling means on the other carriage, and means for spinning the cans to effect the seam rolling operation while the cans are being advanced.

11. 8. 16. In a can heading machine, a vertical shaft, a plurality of revoluble can supporting disks carried by said shaft, a stationary gear encircling said shaft, a series of pinions meshing with said gear and carried by said shaft in vertical axial alinement with the can supporting disks, means on said pinions adapted to encircle a can top and can carried on the supporting disk therebeneath to form a double seam between the can top and can body, and a stationary cam for cooperating with said last named means on the rotation of the shaft and the pinions to form a double seam.

M. 12. 9. 17. In a can heading machine, a vertical shaft, a plurality of revoluble can supporting disks carried by said shaft, a stationary gear encircling said shaft, a series of pinions meshing with said gear and carried by said shaft in vertical axial alinement with the can supporting disks, means on said pinions adapted to encircle a can top and can carried on the supporting disk therebeneath to form a double seam between the can top and can

body, a stationary cam for cooperating with said last named means on the rotation of the shaft and the pinions to form a double seam, a second shaft,

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revoluble can supporting means thereon, means for delivering the cans from the can supporting disks to the last named can supporting means, means for rotating the cans on their supporting means, and spring pressed rollers engageable with the double seam adapted to roll the latter on rotation of the last named shaft.

~~13~~. 10. ~~18~~. In a can heading machine, a vertical rotary shaft, a plurality of revoluble can supporting disks carried thereby, a series of spindles arranged in vertical alinement with the centers of said disks, bearings on said shaft in which said spindles are revolubly mounted, disks on said spindles opposite the can supporting disks, means for reciprocating the can supporting disks to clamp cans and can tops against the disks on the spindles, pinions on said spindles, a stationary gear concentric with the shaft engaging said pinions whereby the cans are spun on rotation of the shaft while advancing, and means on said pinions arranged to encircle the can top to form a double seam between the can top and can body.

14. 11. 19. In a can heading machine, a vertical rotary shaft, a plurality of revoluble can supporting disks carried thereby, a series of spindles arranged in vertical alinement with the centers of said disks, bearings on said shaft in which said spindles are revolubly mounted, disks on said spindles opposite the can supporting disks, means for reciprocating the can supporting disks to clamp cans and can tops against the disks on the spindles, pinions on said spindles, a stationary gear concentric with the shaft engaging said pinions whereby the cans are spun on rotation of the shaft while advancing, means on said pinions arranged to encircle the can tops to form a double seam between the can top and can body, comprising diametrically slidable seaming rings, and a stationary cam arranged to shift said rings as the cans are advanced.

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15. 20. 12. In a can heading machine, a pair of revoluble shafts, a plurality of resiliently supported revoluble can supporting disks carried by each of said shafts, revoluble spindles carried by each of said shafts in vertical alinement with the axes of said disks, can top engaging disks on said spindles, means whereby the rotation of said shafts will rotate said

spindles and thereby spin cans carried by the supporting disks, means controlled by the spindles carried by one of the shafts for forming a double seam between the can tops and can bodies, means cooperating with the disks on the spindles carried by the other shaft for rolling the seams, means for rotating the shafts continuously in unison, and means for transferring the cans from one set of disks to the other set of disks.

16. 21. 13. In a can heading machine, means for clamping a can body and can top together, means for advancing the can and can top while clamped, means for rotating the clamping means while advancing to spin the can and can top, and means circling the can top for forming a double seam while the can and top are spinning and advancing.

17. 22. 14. In a can heading machine, means for clamping a can body and can top together, means for advancing the can and can top while clamped, means for rotating the clamping means while advancing to spin the can and can top, means encircling the can top for forming a double seam while the can is spinning and advancing, means for automatically removing the can and can top from the clamping means, and means for thereafter rolling the double seam while the can is being advanced.

18. 23. 15. In a can heading machine, means for clamping a can body and can top together, comprising a can top engaging disk and a resiliently mounted vertically reciprocal can supporting disk, means for advancing the clamping means, means

for rotating the can top engaging disk to spin a
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can while advancing, and means encircling the can top for forming a double seam while the can is spinning and advancing.

19. 24. 16. In a can heading machine, means for clamping a can body and can top together, comprising a can top engaging disk and a resiliently mounted vertically reciprocal can supporting disk, means for advancing the clamping means, means for rotating the can top engaging disk to spin a can while advancing, means encircling the can top for forming a double seam while the can is spinning and advancing, means for automatically removing the can from between the disks, and means for thereafter rolling the double seam thereon while the can is advancing.

20. 25. 17. In a can heading machine, means for clamping a can body and can top together, comprising a can top engaging disk and a resiliently mounted vertically reciprocal can supporting disk, means for advancing the clamping means, means for rotating the can top engaging disk to spin a can while advancing, comprising a spindle on which the disk is mounted, a pinion on said spindle, and a

stationary gear meshing with said pinion around which the latter is advanced, and means encircling the can top for forming a double seam while the can is spinning and advancing.

~~26. In a can heading machine, a vertical revoluble shaft, a guide bearing carried thereby, a vertical stem slidably carried in said bearing, means for reciprocating said stem as the shaft is rotated, a revoluble can supporting disk reciprocally mounted in relation to said stem, a can top engaging disk spaced from the can supporting disk, and means for rotating the can top engaging disk as the shaft revolves to spin a can and can top interposed between the disks.~~

21. 18. 27. 26. In a can heading machine, a vertical revoluble shaft, a guide bearing carried thereby, a vertical stem slidably carried in said bearing,

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means for reciprocating said stem as the shaft is rotated, a revoluble can supporting disk reciprocally mounted in relation to said stem, a can top engaging disk spaced from the can supporting disk, means for rotating the can top engaging disk as the shaft revolves to spin a can and can top interposed between the disks, and means carried by the can top engaging disk encircling the can top for form-

ing a double seam between the can top and can body as the latter is spun while the shaft is rotated.

~~28. 27. In a can heading machine, a vertical revoluble shaft, a guide bearing carried thereby, a vertical stem slidably mounted in said bearing, means for reciprocating said stem as the shaft is rotated, a disk revolubly and reciprocally mounted in relation to said stem, a spring forming a yieldable support for said disk, a can top engaging disk spaced from the can supporting disk, and means for rotating the can top engaging disk while the shaft is revolving to spin a can and can top interposed between the disks.~~

~~29. In a can heading machine, a vertical revoluble shaft, a guide bearing carried thereby, a vertical stem slidably mounted in said bearing, means for reciprocating said stem as the shaft is rotated, a disk revolubly and reciprocally mounted in relation to said stem, a spring forming a yieldable support for said disk, a can top engaging disk spaced from the can supporting disk, means for rotating the can top engaging disk while the shaft is revolving to spin a can and can top interposed between the disks, and means encircling the can top for forming a double seam while the can is being spun and advanced.~~

~~23. 30. 28. In a can heading machine, a mechanism for delivering cans and can tops coincidentally to a seaming mechanism, comprising a horizontal wheel formed with can receiving depressions on its periphery, a rack adapted to receive a stack~~

of can tops, a pivoted blade forming a support for the can tops, means operable by a can in the wheel

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for rocking the blade to release a can top, and a finger on the wheel for engaging the released can top and moving it from beneath the stack.

~~29~~

24. ~~31.~~ In a can heading machine, a mechanism for delivering cans and can tops coincidently to a seaming mechanism, comprising a horizontal wheel formed with can receiving depressions on its periphery, a rack adapted to receive a stack of can tops, a pivoted blade forming a support for the can tops, means operable by a can in the wheel for rocking the blade to release a can top, a finger on the wheel for engaging the released can top and moving it from beneath the stack, and means for restoring the pivoted blade beneath the stack above the released can top before the latter is engaged by the finger.

Per D

A'

Insert C⁵
Per D

C⁵

Remarks:

Claims 1-8 inclusive have been amended to differentiate them from the references of record which is effected by specifying the seaming mechanism in Claims 1-4 and 6 and 7 as "encircling" the can tops, by amending Claim 5 to include "means for rotat-

ing the cans," and specifying "the finger" on the wheel for engaging delivered can tops in Claim 8.

Reconsideration of Claims 9-12 inclusive is requested.

None of the references disclose the combination of mechanisms now set forth in the claims originally submitted or those filed herewith, that is, means for advancing the can continuously, means for spinning the can while advancing, means encircling the can top cooperating with the can spinning means for forming a double

seam between the can top and can body with secondary mechanism for rolling the formed seam without stop and start movement of the can. H. B. & M.

The patent to Brenzinger shows a can heading machine thru which the cans pass with intermittent movement and in which the can is held against rotation during the seaming action.

The patent to Black, whilst disclosing a machine in which continuous advance movement of the can

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June 7, 1915

therethru is effected, the can is held against rotation during the seaming operation, furthermore no means are provided on the first revoluble can conveying carriage for forming a double seam. To substitute the initial can seaming mechanism or

Brenzinger for the can flanging mechanism or Black or vice versa would not supply an anticipation of the claims as such change would render both machines inoperative.

The patent to Wagner, whilst disclosing a mechanism whereby the can is turned in forming the seam and is advanced continuously thru the machine, the seaming mechanism does not "encircle" the can head as in applicants' device.

The patent to Walsh shows a mechanism for double seaming the can which encircles the can top but does not show the can advancing and spinning mechanism claimed.

To substitute any of the devices in the references for parts of the applicants' mechanism would not supply a machine capable of the results obtained by the present machine, neither would the joining the mechanism of the references result in a machine corresponding to that of the applicants'. The feature of the applicants' machine whereby the cans are rotated while advancing continuously increases the rapidity with which the cans can be successfully headed; this machine being capable of an output of one hundred fifty cans per minute, which is greater than is practical with machines employing an intermittent movement or those in which the cans are held stationary whilst the seaming rollers are operating thereon, as is the case in Brenzinger and Black.

The reference to Brenzinger as a foundation for rejecting the claims is not clear in as much as no rotating carriages by which the cans are advanced

continuously is shown; the rotary member thereof being revolved axially of the can while the latter is stationary. The applicants were aware of this construction and operation and considered it objec-

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June 7, 1915

tionable because of slow output and devised their present machine to overcome this and other objections in machines of the Brenzinger type.

In view of the foregoing it is believed the claims originally submitted, together with those filed herewith, will now be allowed.

Very respectfully,

R. S. BERRY,

Atty. for Appellants.

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HSB L.

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U. S. Patent Office.

7685.

Jun. 15, 1915.

Division 14.

Serial No. 856,117. Paper No. 4.

New Oath.

OATH.

State of California,

County of Los Angeles,—ss.

Arthur D. Sumner and Ray O. Wilson, the above named petitioners, being duly sworn, depose and

say that they are citizens of the United States and residents of Los Angeles, in the County of Los Angeles, State of California, and that they verily believe themselves to be the original, first and joint inventors of the improvements in CAN HEADING MACHINES described and claimed in the annexed specification; that they do not know and do not believe that the same was ever known or used before their invention or discovery thereof; or patented or described in any printed publication in any country before their invention or discovery thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented to them or to others with their knowledge or consent in this or any foreign country for more than two years prior to this application, or on an application for a patent filed in any country foreign to the United States by them or their legal representatives or assigns more than twelve months prior to their application; and that no application for patent on said improvement has been filed by them or their representatives or assigns in any country foreign to the United States.

ARTHUR D. SUMNER.

RAY O. WILSON.

Sworn and subscribed to before me this 5th day of April, 1915.

[Seal]

JOSIAH L. GELLER,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires March 11, 1919.

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Div. 14. Room 309

Address only

“The Commissioner of Patents,
Washington, D. C.,”
and not any official by name.

Paper No. 5.

All communications respecting this application should give the serial number, date of filing, title of invention, and name of the applicant.

U. S. Patent Office.

Jun. 30, 1915.

Mailed.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington.

ILT.

June 30, 1915.

R. S. Berry,

506 Central Bldg.,

Los Angeles, Calif.

Please find below communication from the EXAMINER in charge of the application of Wilson & Sumner; Serial No. 856,117; filed August 10, 1914; for Can Heading Machines.

THOMAS EWING,

Commissioner of Patents.

This case has been examined as amended June 17, 1915.

Claim 1 is rejected on reference to Brenzinger taken with Black, both of record. As disclosed by Black, it is old to perform the seaming and compressing operations by means of tools mounted upon a single capping head. Brenzinger shows that it is old to separate these tools so as to perform the operations thereby at two distinct stations. In view of this, there is no invention in mounting a tool for double seaming a can cap to a can body on a turret, as shown by Black, and then feeding the can body from that turret to a similar one upon which the compressing operation is performed by another tool.

Claims 2 and 4 are rejected on the same references as claim 1, taken with Johnson of record. Johnson shows means for feeding can bodies and caps simultaneously to the operating machine. In view of this, there is no invention in providing any
and
type of seaming machine with can body A cap feeding means, as disclosed by Johnson.

Claims 3, 5, 13, 14, 15, 18 to 25 inclusive, 27 and 29 are rejected on the ground that they are in-

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accurate. In these claims it is stated that the
No. 856,117, Page 2. 121

cans are spun or rotated during the operating of forming the double seam. As disclosed, the seaming means is rotated while the can body is held stationary between the chucks.

Claim 7 is rejected on the ground that the same means is covered twice, namely, the can top encircling and engaging disks on said spindles, and the means for forming seams between the can tops and the cans as they are advanced.

Claims 9 and 16 are rejected on Black of record, alone or taken with 770,803, September 27, 1904, Gillette, Class 113-5. The Gillette patent shows a stationary gear by means of which the seaming tools are caused to rotate on their axes during their movement around the stationary gear.

Claim 10 is rejected on the same references as claims 9 etc., taken with Wegner of record.

Claim 11 is rejected on the ground that it is vague and indefinite and incomplete. There is no antecedent for the term "supporting disks" in line 5.

Claim 26 is rejected on reference to Wegner of record.

Claim 28 is rejected on reference to Wegner of record, taken with 747,671, December 22, 1903, Adriance, Class 113-19.

Claims 12, 17, 30 and 31 are deemed allowable.

F

L. A. MAXSON,

Examiner.

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Serial No. 856,117. Paper No. 6
Amendment B.

Mail Room.

Jul.

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1915

U. S. Patent Office.

Paper No. 6.

Los Angeles, California, July 23, 1915.

Div. 14, Room 309.

Wilson & Sumner.

CAN HEADING MACHINE.

Serial No. 856,117.

Filing Date, Aug. 10, 1914.

To the Commissioner of Patents,

Sir:

In response to Office action of June 30, 1915:

Claim 7, line 10, after "means" insert on said disks.

Claim 11, line 8, change "means" to disks.

Cancel Claims 26 and 29, and re-number the remaining claims in their order.

REMARKS.

Reconsideration of Claim 1 is requested for the following reasons:

The fact that it is old to perform the seaming and compressing operations by means of tools mounted upon a single capping head, and that it is old to separate these tools so as to perform the operations thereby intermittently at two distinct stations, does not anticipate applicant's Claim 1, which is drawn to a construction which calls for a

pair of continuously revoluble can conveying carriages and means for forming a double seam on a can while it is being advanced on one carriage and means for rolling the seam while the can is being advanced on the other carriage, with means for transferring the can from one carriage to the other. The can is being advanced at all times during its progress through the machine and does not come to rest at any point. To devise a mechanism to effect this continuous operation certainly requires the exercise of the inventive faculties even though the inventor was aware of the intermittent

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double turret type of machine and the continuous single turret and conceived an arrangement by which the continuous operation of a double turret could be effected and whereby the speed of the output and efficiency could be increased, over either type; this would amount to an improvement of great value and constitute a step in the advance of the art. It is contended that the patents to Black and Brensinger do not anticipate the applicant's structure. Claim 1 cannot be read singly or collectively on these references, which is apparent on a careful analysis of this claim in comparison with the devices of Black and Brensinger. Taking this claim element by element:

1. "A continuously revolving can conveying carriage—" Such a carriage is found in Black, but not in Brensinger.

2. “Means on said carriage for encircling and forming a double seam between a can top and a can body carried thereon—” Such a seam-forming means is not found in the device of Black, as (the seam-forming means of Black does not encircle the can top,) and, furthermore, operates in conjunction with compressing tools upon the single carriage, as conceded by the Examiner. Furthermore, no seam-forming means is shown on a continuously revoluble can conveying carriage in Brensinger.

3. “A second continuously revolving can conveying carriage—” This element is not disclosed in either the reference to Black or to Brensinger and apparently not considered by either. In fact, to make the carriage of Brensinger continuously revoluble would necessitate a complete reconstruction of the machine and alteration of its mode of operation.

4. “Means on said second carriage for rolling a seam formed on the first carriage—” There being no second continuously revolving can conveying carriage in either of these references, it follows that this element does not appear.

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5. “And means for automatically passing the can from the first carriage to the second carriage—” There being no second continuously revolving can conveying carriage in Black or Brensinger, corresponding to that of the applicant, this last-named element is not equivalent to the can-passing mechan-

ism of Black or Brensinger when considered in combination with the previous elements of the claim. From the foregoing it is manifest that the elements of this claim are a new combination.

The applicant maintains that the intermittent delivery of a can and can top from a seam-forming to a seam-rolling mechanism as shown in Brensinger is not equivalent to the continuous feeding of the can as here claimed. When the applicant specifically states that the object of his invention is to provide a can-heading machine which is continuous in operation, that is, in which the can is conveyed continuously through the machine without stopping and starting movement and the claim is drawn accordingly, it is not understood why the Examiner persists in rejecting the claim on the patent to Brensinger which discloses the very intermittent movement which applicant has succeeded in avoiding.

Reconsideration of Claims 2 and 4 is requested on the above grounds, and, furthermore, because the inclusion of a means for feeding can bodies and can tops simultaneously is an element employed in conjunction with a new combination of elements, and the fact that it had previously been employed with other types of feeding machines, should not operate as a bar to the allowance of these claims when not aggregated by claiming it specifically.

In reference to Claims 3, 5, 13, 14, 15, 18 to 25 inclusive, 27 and 29, the Examiner's attention is called to the statement beginning in line 28, page

8 of the specification, to Fig. 10 of the drawings, and to the statement beginning in line 21, on page 13.

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In these, it will be seen that the cans are spun, or rotated, during the operation of forming a double seam. This spinning of the can is an important feature of the applicant's invention, as it materially increases its capacity. On reconsideration of these claims, it is believed they will be allowed.

Claims 9 and 10 call for seam-forming means carried by the pinions, in lines 4 and 5, respectively, and Claim 16 calls for "means on said pinions adapted to encircle a can top, etc." It will be noted that such construction is not disclosed in Black, Gillette, or Wagner, cited by the Examiner in rejection thereof. This specific construction characterizes these claims and distinguishes them from these references, and it is thought they should be allowed.

Respectfully submitted.

R. S. BERRY,
Atty. for Applicant.

R. S. Berry,
506 Central Building,
Los Angeles, California.

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Div. 14 Room 309

Address only

“The Commissioner of Patents,
Washington, D. C.,”
and not any official by name.

Paper No. 7.

All communications respecting
this application should give the
serial number—date of filing,
title of invention, and name of
the applicant.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,

I. L. T.

Washington.

September 18, 1915.

R. S. Berry,

506 Central Bldg.,

Los Angeles, Calif.

Please find below a communication from the EX-AMINER in charge of the application of Wilson & Sumner; Serial No. 856,117; filed August 10, 1914; for Can Heading Machines.

THOMAS EWING,

Commissioner of Patents.

This case has been examined as amended July 29, 1915.

The carrier 56 in Fig 20 is not correctly shown. This figure should be amended to correspond with Fig. 6, that is, the curved line indicating the periphery of the carrier 56, between characters 73 and 58, should be changed to a double line.

The last ten lines on page 5 should be revised because the present description of the cap dropping and separating means is vague. This description should be made to correspond to the description of the members 65 and 66 in lines 13 and 14 of page 6.

“Seaming” should be “seam compressing” in lines 12, 15, 21 and 24 of page 10.

In line 24, same page, “on” should be “after.”

Page 11, line 12, “180” should be “80.”

In the 5th line from the bottom of page 13, “36” should be “86.”

The rejection of claim 1 is reiterated. It is insisted upon that the arrangement claimed by applicant does not amount to invention in view of the

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art as cited, and issue on this point is taken with the applicant. This claim is also met by 1,096,937, May 19, 1914, Nichols, Class 113-23, and is therefore rejected thereon.

Claims 5 and 11 are rejected on the same references as claim 1, and for the same reasons.

The rejection of claims 2 and 4 is reiterated. These claims are further rejected on Nichols cited.

Claims 1 to 5 inclusive, 7, 9 to 11 inclusive, and 13 to 27 inclusive are rejected on the ground that they are not supported by the present disclosure. In the last paragraph on page 7 it is stated that the collar 84 is rigidly mounted on the stud 83, while the claims state that the lower chuck which comprises the collar 84 is rotatable. It is thought that the description of this collar as being rigidly mounted is inaccurate, and therefore “rigidly” in line 23 of page 7 should be changed to “rotatably.” In connection with this, attention is called to the description contained on

page 8. If the disk 96 is rotated as therein described, the can body must be rotated with it, but, as described on page 7 of the matter referred to, this is not possible because the support 86 is said to be fixed or rigidly mounted.

Claim 9 is rejected on the same references as cited against it in the last Office action, taken with Brenzinger of record. It is not seen that there is any advantage, and therefore that there is any invention, in placing the gear at the lower end of the spindle of the Black machine. Attention is also called to the fact that Brenzinger shows the arrangement as claimed.

Claim 10 is rejected on the same references as claim 9, taken with Wegner of record.

Claim 27, formerly 28, is rejected on reference to 1,077,393, November 4, 1913, Conradi, Class 113-23.

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Claims 8, 12, 28, and 29 are deemed allowable.

Claims 3, 7, and 13 to 26 inclusive contain novel subject-matter and will be allowable when the correction suggested in line 23 of page 7, has been made.

F.

L. W. MAXON,
Examiner.

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Serial No. 856,117

Amendment C

Paper No. 8

Mail Room

Nov. 2, 1915,

U. S. Patent Office.

Los Angeles, California, October 28, 1915.

Div. 14, Room 309,

Wilson & Sumner,

CAN HEADING MACHINES,

Serial No. 856,117,

Filed August 10, 1914.

Commissioner of Patents,

Washington, D. C.

Sir:

In response to office action of September 18, 1915,

Correct Fig. 20 of the drawings as indicated in red ink in the accompanying print, an order for such correction and for photographic copy being filed herewith.

Page 5 cancel the paragraph beginning with line 25 and ending at line 30 and insert the following paragraph:

The can tops a are supported between the guide members 60 by means of a plate 64 which engages the edge of the lowermost can top, as shown in Fig. 21; the opposite edge of the lower-most can top extending downward toward a pair of spaced supporting plates 65 and 66, with the depressed portion b of the can top resting on the supporting plates 65 and 66 so that on withdrawal of the plate 64 from beneath the can top it will drop and be supported entirely on the plates 64 and 65, as shown on dotted lines in Fig. 21 and in full lines in Fig. 22.

Page 10 lines 12, 15, 21 and 24 change "seaming" to seam compressing.

Line 24 change "on" to after. Page 11 line 12 change "180" to 80. Page 13, 5th line from the bottom, change "36" to 86.

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Page 7 line 24 after "86" insert forming a chuck.

Line 27 after "84" insert so that the disk or
chuck 86 may have reciprocal and rotary movement
in relation to the collar 84.

Re-write Claim 1 as follows:

1. In a can heading machine, a continuously re-
voluble can conveying carriage, means for deliver-
ing a can and can top coincidently to said carriage,
means on said carriage for forming a double seam
between a can top and can body carried thereon,
a second continuously revoluble can conveying car-
riage, means for automatically passing the can from
the first carriage to the second carriage, and seam
compressing means on said second carriage for roll-
ing the seam formed between the can and can top on
the first carriage.

Claim 2 line 6 erase "and."

Last line after "carriage" insert and means of
each of said carriages for revolving the can in rela-
tion thereto.

Cancel Claims 4 and 5.

Cancel Claims 9, 10 and 11.

Cancel Claim 27, former Claim 28 and insert the
following claim, being former Claim 29, which was
inadvertently cancelled instead of Claim 28 in paper
#6:

~~22. In a can heading machine, a vertical revoluble shaft, a guide bearing carried thereby, a vertical stem slidably mounted in said bearing, means for reciprocating said stem as the shaft is rotated, a disk revolubly and reciprocally mounted in relation to said stem, a spring forming a yieldable support for said disk, a can top engaging disk spaced from the can supporting disk, means for rotating the can top engaging disk while the shaft is revolving, to~~

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October 28, 1915.

S. N. 856,117.

~~spin a can and can top interposed between the disks, and means encircling the can top for forming a double seam while the can is being spun and advanced.~~

Renumber the claims in their order.

Insert the following claim:

~~25. In a can heading machine, means for clamping a can body and can top together, means for advancing the can and can top while clamped, means for rotating the clamping means while advancing to spin the can and can top, and means carried by the clamping means for forming a double seam while the can and can top are spinning and advancing.~~

Remarks:

Claim 1 has been rewritten to include the means for delivering a can and can top coincidently to the first continuously revoluble can conveying carriage, which is believed to so distinguish this claim from the references of record to warrant its allowance. The new reference to Nichols discloses a series of four separate machines combined, thru which a can is passed, each machine performing a separate step in the seam forming and rolling operations, and does not disclose a pair of continuously rotary carriages which perform the complete operation, as in applicant's machine and as set forth in Claim 1. The applicant still contends that as no one machine has been disclosed showing the assemblage set forth in this claim 1, that allowance of a claim of this character ~~should~~ be should be granted.

Claim 2 has been amended to include the can rotating means and is therefore believed to be allowable.

Claims 4, 5, 9, 10 and 11 have been withdrawn.

With reference to the Examiner's remarks in the

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October 28, 1915

fourth paragraph of Page 2 of the last office letter. The Examiner has manifestly erred, both in reading the drawings and the specifications, as to the

matter on page 7 describing the member 86 as fixed or rigidly mounted, as stated by the Examiner. Line 26 page 7 states that this member has a flange 87 adapted to slidably engage the upper end of the collar 84 and therefore could not be fixed or rigidly connected to the collar. However, by the amendment to line 27 specifying that the disk 86 has reciprocal and rotary movement in relation to the collar 84, vagueness in this respect is removed.

Claim 27, formerly 28 rejected on Conrady, should have been cancelled instead of Claim 29, which is believed to be allowable in view of the remarks in previous amendment relative thereto.

New claim 25 is believed to be allowable in view of the absence of any disclosure in the references corresponding thereto.

It is now believed that this case can be passed to issue and allowance is therefore respectfully requested.

Respectfully,

R. S. BERRY,

Attorney for Applicants.

506 Central Bldg.

4

856117

46

184 *Angelus Sanitary Can Machine Co. et al.*

Mail Room,

Nov. 2, 1915.

U. S. Patent Office.

Serial No. 856,117. Paper No. 9.

Letter (to Dfts.) & print.

Los Angeles, California, October 28, 1915.

Div. 14, Room 309,

Wilson & Sumner,

CAN HEADING MACHINES,

Serial No. 856,117,

Filed August 10, 1914.

Commissioner of Patents,

Washington, D. C.

Sir:

File photographic copy of the drawing containing Fig. 20 in the above entitled case and have the office draughtsman make the corrections indicated in red ink on the accompanying print, charging the cost of same to our account.

Respectfully,

HAZARD, BERRY & MILLER,

R. S. BERRY,

Attorney for Applicants.

506 Central Bldg.

Chg. Account of Hazard, Berry & Miller.

Approved:

L. W. MAXSON,

Ex.

856117

47

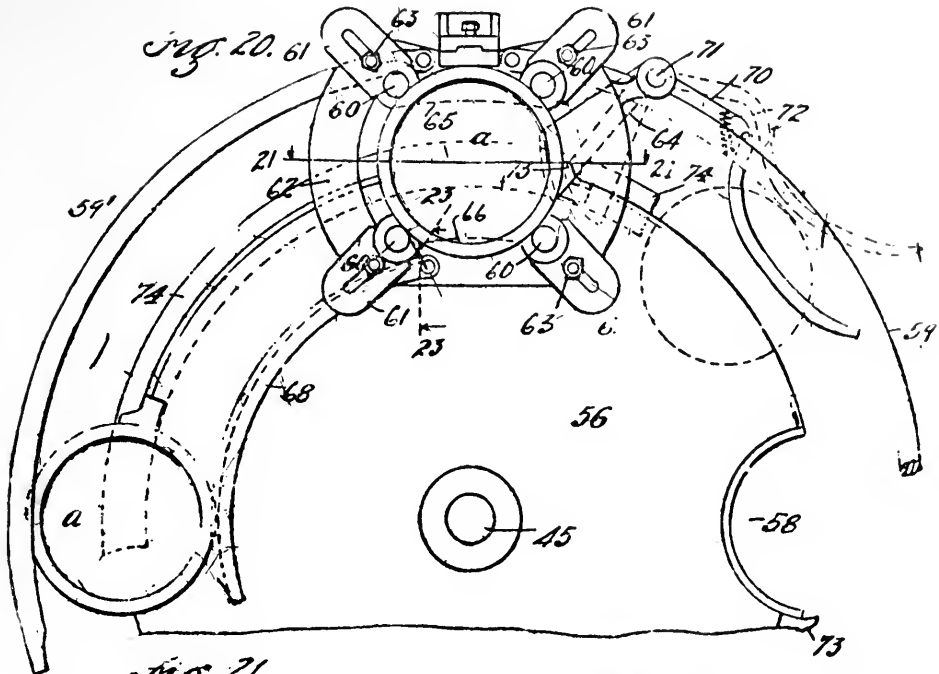


Fig. 21.

Fig. 22.

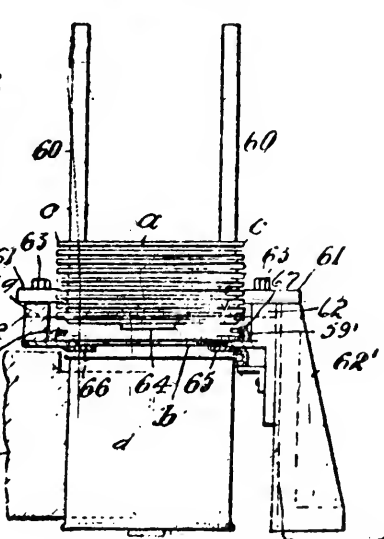
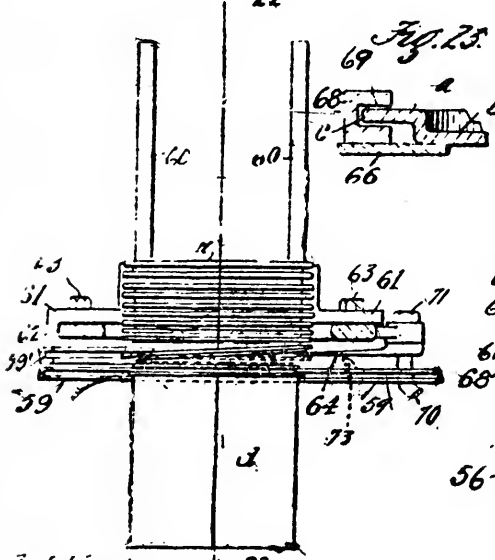
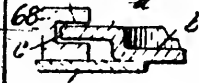
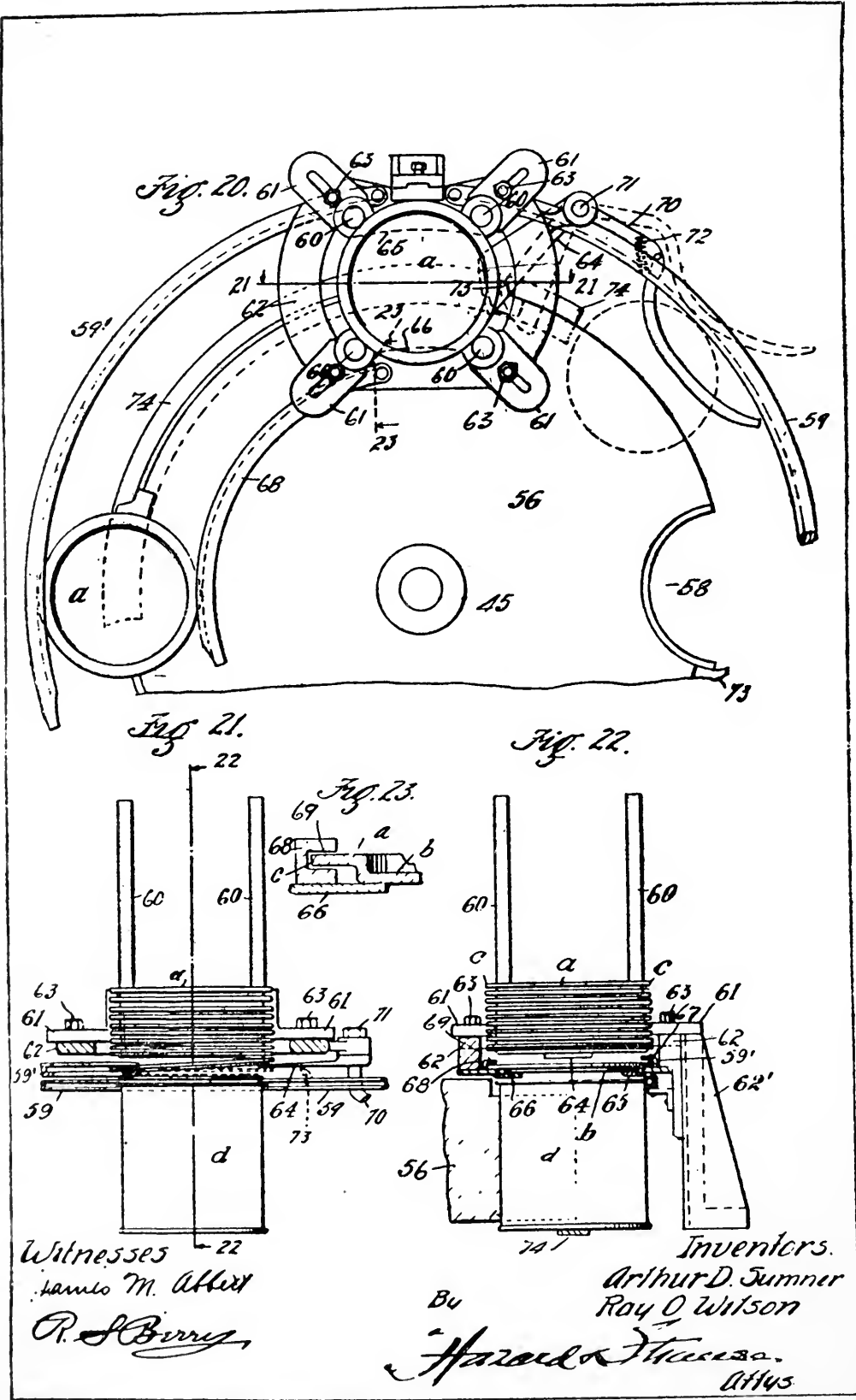


Fig. 23.



Witnesses
 James T. H. [unclear]
 P. S. [unclear]

inventors
 Arthur D. Sumner
 Ray O. Wilson
 Du 8561



Witnesses
 James M. Abbott
 R. S. Berry

Inventors.
 Arthur D. Sumner
 Roy O. Wilson
 By
 Harold H. Hays
 Attys

2—260.

237

Div. 14

Room 309

Paper No. 11

Address only

“The Commissioner of Patents,
Washington, D. C.,”
and not any official by name.

All communications respecting
this application should give the
serial number, date of filing, title
of invention, and name of the ap-
plicant.

ILT.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington.

December 10, 1915.

R. S. Berry,

506 Central Bldg.,

Los Angeles, Calif.

Please find below a communication from the
EXAMINER in charge of the application of Wilson
& Sumner; Serial No. 856,117; filed August 10,
1914; for Can Heading Machines.

THOMAS EWING,
Commissioner of Patents.

This case has been examined as amended No-
vember 2, 1915.

The description inserted after “84,” line 27, page
7, should be canceled because it is inaccurate. This
will be obvious when considering the description
contained in lines 27 to 30 inclusive of page 7. As
therein described, the disk 86 carries bolts 88 which
pass through apertures in a flange 85. Therefore
there can be no relative rotary movement between
the chuck 86 and the collar 84. In view of this,
it is reiterated that “rigidly” in line 23 of page 7
should be changed to “rotatably.”

To make the description of the parts consistent throughout, the last paragraph on page 9 should also be revised and it should be stated therein that the collar 111 is rotatable on the stem 112.

Claim 1 is rejected on the references and for the reasons of record taken in connection with 1,151,840, August 31 1915, Warme, and 1,152,188, August 31, 1915, Kruse, Both in Class 113-14.

Kruse shows two different seaming tools operating at two stations to perform a seaming operation similar to the disclosure in the Brenzinger patent. The application of this reference will be clear upon reference to the application of the Brenzinger

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No. 856,117, Page 2.

reference in former office actions. Warme shows a can body seamed by being rolled along two separate and distinct seaming tools. In view of the art cited, it would not be invention to mount these tools on two distinct rotary carriers for performing the first and second seaming operations.

Claim 2 is rejected on reference to Nichols of record alone or taken with Warme cited.

Claim 22 is rejected on reference to any one of the following patents: Black, Conradi or Wegner, all of record.

Claim 25 is rejected on reference to Black of record.

The remaining claims are deemed allowable subject to the corrections in the description as required by this office action.

F.

L. W. MAXSON,
Examiner.

856117

51

7690

U. S. Patent Office,
Feb. 1, 1916,
Division 14.
Mail Room.
Jan. 31, 1916,
U. S. Patent Office.

Serial No. 856,117. Paper No. 12.
Amendment D.

Los Angeles, California, January 25, 1916.

Div. 14, Room 309,
Wilson & Sumner,
CAN HEADING MACHINES,
Serial No. 856,117,
Filed August 10, 1914.
Commissioner of Patents,
Washington, D. C.

Sir:

In response to the Official action of December 10, 1915, amendment to the above entitled application is hereby made as follows:

Page 7 line 23 change "rigidly" to rotatably.

Line 27 erase the description inserted after "84."

D*

Line 30 before “A” insert The disk or chuck 86
thus has reciprocable and rotary movement in
relation to the stem 78.

Page 9 line 27 before “mounted” insert recipro-
cably.

Line 28 erase “carried by a threaded stem 112
on” and insert rotatably mounted on a stud 112
carried by.

Cancel Claims 1, 2, 6, 22, 23, 24 and 25.

Renumber the claims in their order.

Remarks:

This case is now in condition for immediate allowance as the specification has been amended according to the suggestions of the Examiner and the rejected claims cancelled.

Claims 6, 23 and 24 have been withdrawn as the mechanism covered thereby is made the subject matter of a separate application, filed January 14, 1916, serial number 72,056. As the assignee, F. F. Stetson, is also an assignee in the new application, it is believed his written consent for the trans-

856117

S. N. 856,117.

January 25, 1916.

fer of these claims is not necessary. If such is required, same will be filed on notice.

Respectfully submitted,

R. S. BERRY,
Attorney for Applicant.

506 Central Bldg.

2

856117

53

2—181

Address Only

The Commissioner of Patents,
Washington, D. C.

AH

Serial No. 856117

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington.

Feb. 5, 1916.

Ray O. Wilson & Arthur D. Sumner, Assor.

Sir: Your APPLICATION for a patent for an
IMPROVEMENT in

Can Heading Machine

filed Aug. 10, 1914, has been examined and AL-
LOWED.

The final fee, TWENTY DOLLARS, must be
paid not later than SIX MONTHS from the date
of this present notice of allowance. If the final
fee be not paid within that period, the patent on
this application will be withheld, unless renewed

IN REMITTING THE FINAL FEE GIVE THE SERIAL NUMBER AT THE HEAD OF THIS NOTICE.

UNCERTIFIED CHECKS WILL NOT BE ACCEPTED.

with an additional fee of \$15, under the provisions of Section 4897, Revised Statutes.

The office delivers patents upon the day of their date, and on which their term begins to run. The printing, photolithographing, and engrossing of the several patent parts, preparatory to final signing and sealing, will require about four weeks, and such work will not be undertaken until after payment of the necessary fee.

When you send the final fee you will also send, **DISTINCTLY AND PLAINLY WRITTEN**, the name of the **INVENTOR**, **TITLE OF INVENTION**, **AND SERIAL NUMBER AS ABOVE GIVEN**, **DATE OF ALLOWANCE** (which is the date of this circular), **DATE OF FILING**, and, if assigned, the **NAMES OF THE ASSIGNEES**.

If you desire to have the patent issue to **ASSIGNEES**, an assignment containing a **REQUEST** to that effect, together with the **FEE** for recording the same, must be filed in this office on or before the date of payment of final fee.

After issue of the patent uncertified copies of the drawings and specifications may be purchased at the price of **FIVE CENTS EACH**. The money should accompany the order. Postage stamps will not be received.

Final fees will **NOT** be received from other than the applicant, his assignee or attorney, or a party

in interest as shown by the records of the Patent Office.

Respectfully,

THOMAS EWING,
Commissioner of Patents.

R. S. Berry
506 Central Bldg.,
Los Angeles, Cal.,

856117

54

U. S. Patent Office.

Mar. 8, 1916.

Division 14.

Mail Room.

Mar.

7

1916

U. S. Patent Office.

WESTERN UNION TELEGRAM

Newcomb Carlton, President

George W. E. Atkins, Vice-President

Belvidere Brooks, Vice-President.

Received at Wyatt Building, Cor. 14th and F Sts.,

Washington, D. C. Always Open.

Mar. 7, 1916.

Serial No. —. Paper No. 13.

591 CH 32 NL

Los Angeles Cal. 6.

2081

Commissioner of Patents,

Washington, D. C.

Please permit H. N. Low to examine pending

194 *Angelus Sanitary Can Machine Co. et al.*

applications of Wilson and Sumner for Can Heading Machine filed August tenth, 1914, Serial number eight five six one one seven.

R. S. BERRY.

1250 a. m.

856117

55

Henry T. Hazard

R. S. Berry

Herman Miller

Phones

A5627

Main 3333

HAZARD, BERRY & MILLER

The Pioneer Patent Agency Established 1878
U. S. and Foreign Patents and Trade Marks
Central Building
Los Angeles

Certificate of Deposit

\$20 Rec'd

Aug. 9, 1916.

C. C. U. S. Pat. Office.

August

Fourth

1916

Commissioner of Patents,
Washington,
D. C.

Sir:

We have this day deposited with the First National Bank, of Los Angeles, a United States De-

pository, the final government fee of \$20.00 in the application of Ray O. Wilson and Arthur D. Sumner, for invention entitled Can Heading Machine, assignors to F. E. Stetson, filed August 10, 1914, Serial No. 856117, and allowed February 5, 1916.

Respectfully,

JLG.C.

HAZARD, BERRY & MILLER.

856117

56

C. C.

Ray O. Wilson & Arthur D. Sumner.

Ser. 856,117

Allowed Feb. 5, 1916.

Hazard, Berry & Miller

Filed Aug. 10, 1914.

Invention—Can heading machine.

In event fee is paid. Have issue delayed 3 months or until notified. Do not allow it to issue in due course.

H. B. & M.

R. S. BERRY,

Atty.

ffpd Aug. 9.

Nov. 9.

856117

57

(Copy)

WNF.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,
Washington, D. C.

August 11, 1916.

Mr. R. S. Berry,
506 Central Bldg.,
Los Angeles, Cal.

Sir:

Your letter in relation to the application of Wilson and Sumner, Serial No. 856,117, allowed February 5, 1916, and in which the final fee was paid August 4, 1916, has been received. In accordance with your request and under the latitude allowed by Sec. 4885, R. S., issuance of this patent will be deferred until October 31, 1916, unless you do not later than October 5, request an earlier issue.

Respectfully,

W. F. WOOLAID,
Acting Chief Clerk.

856117

58

2—254

U. S. Patent Office.

Oct. 18, 1916.

Division 14.

Serial No. 856,117. Paper No. 14.

Ex'r's Amendt. E.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,

Washington, D. C.

October 18, 1916.

In compliance with the provisions of order No. 1718, dated June 8, 1907, and which reads as follows:

It is hereby ordered that, except by formal amendment duly signed or as hereinafter provided, no corrections, erasures, or interlineations be made in the body or written portions of the specification or of any other paper filed in an application for patent.

Obvious informalities in the wording of the specification may be corrected by the examiner, but said correction must be in the form of an amendment, approved by the Principal Examiner in writing, placed in the file, and made a part of the record. The changes specified in the amendment will be entered by the clerk in the regular way.

It is directed that no other changes be made by any person in any record of this office without the written approval of the Commissioner of Patents.

Attorneys, employees of the Patent Office, and all others will be held to strict accountability for any violation of this order.

The following changes are made in—

Application Serial No. 856,117; Filed Aug.

10, 1914; Can Heading Machine of R. O. Wilson & Arthur D. Sumner.

Page 11, lines 10 and 11, change “disk” to “disks.”

Page 2, line 6 from the bottom, insert “section” after “vertical.”

CHAS. S. GRINDLE,

Examiner, Division 14.

856117

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R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914.

1,203,295.

Patented Oct. 31, 1916.
9 SHEETS—SHEET 1.

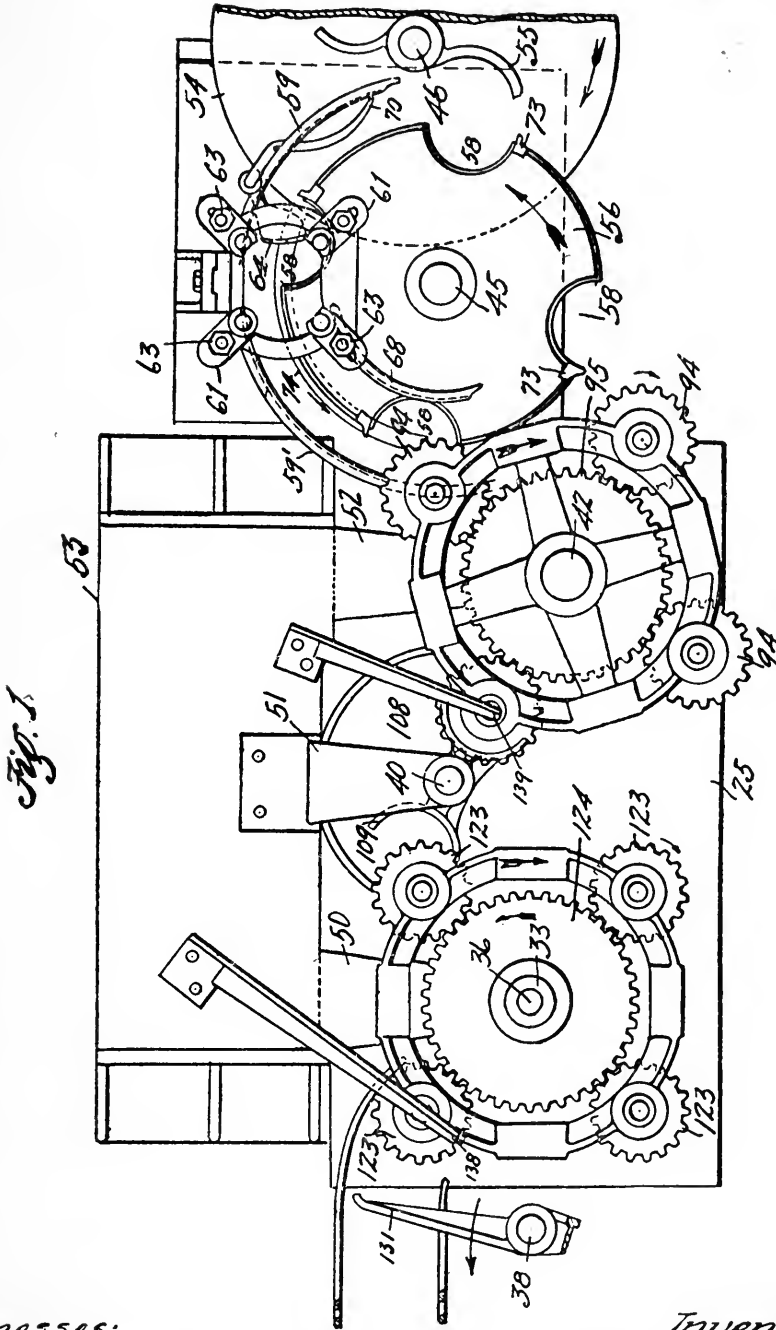


Fig. 1

Witnesses:
James M. Abbott
A. S. Brown

84

Inventors:
Arthur D. Sumner
Ray O. Wilson.

James M. Abbott
Att'y.

R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914.

1,203,295.

Patented Oct. 31, 1916.

SHEETS—SHEET 2.

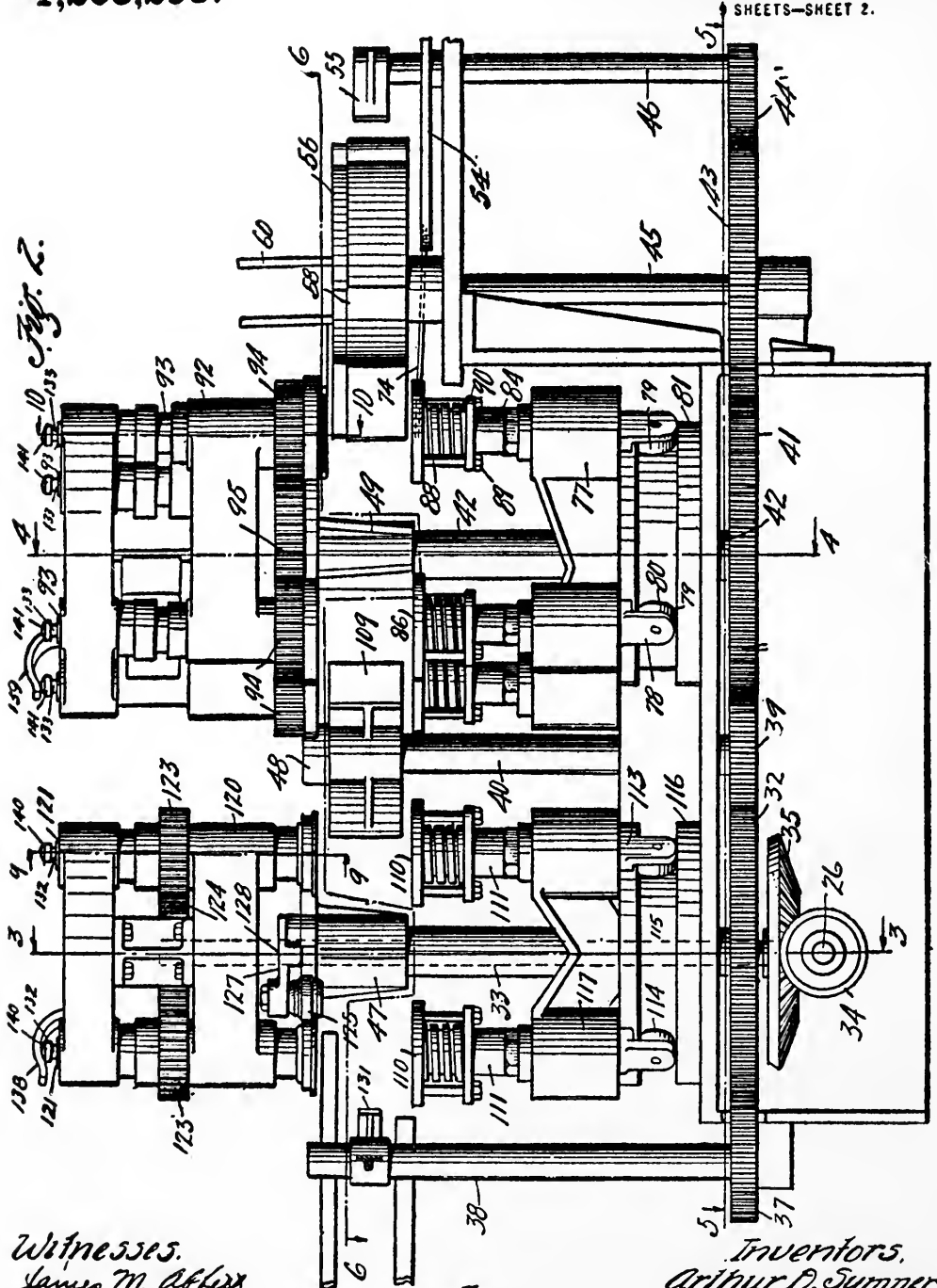


Fig. 2.

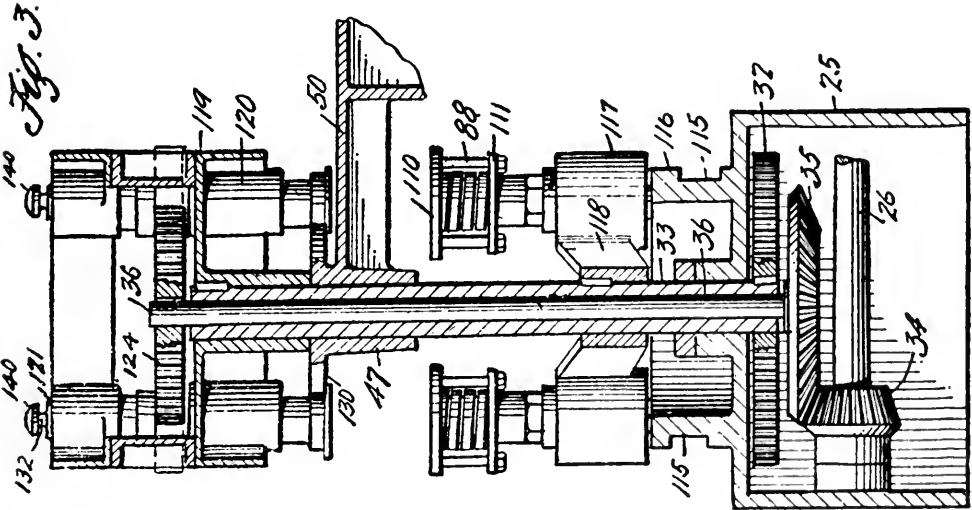
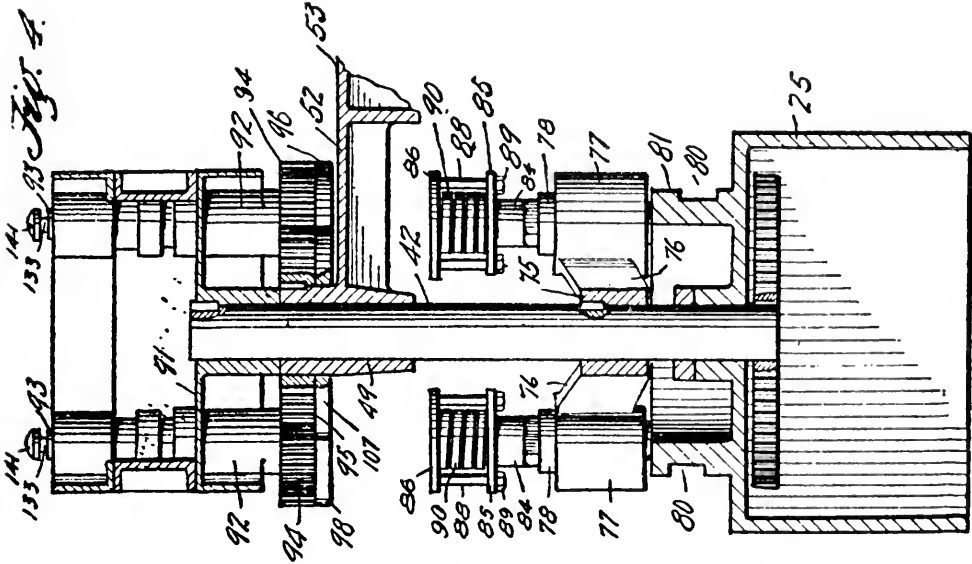
Witnesses.
James M. Alfred
R. S. Berry

Inventors.
Arthur D. Sumner
Ray O. Wilson.
by *James Trause*
Attys.

R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914.

1,203,295.

Patented Oct. 31, 1916.
9 SHEETS—SHEET 3



Witnesses.
James M. Albert
R. S. Barry

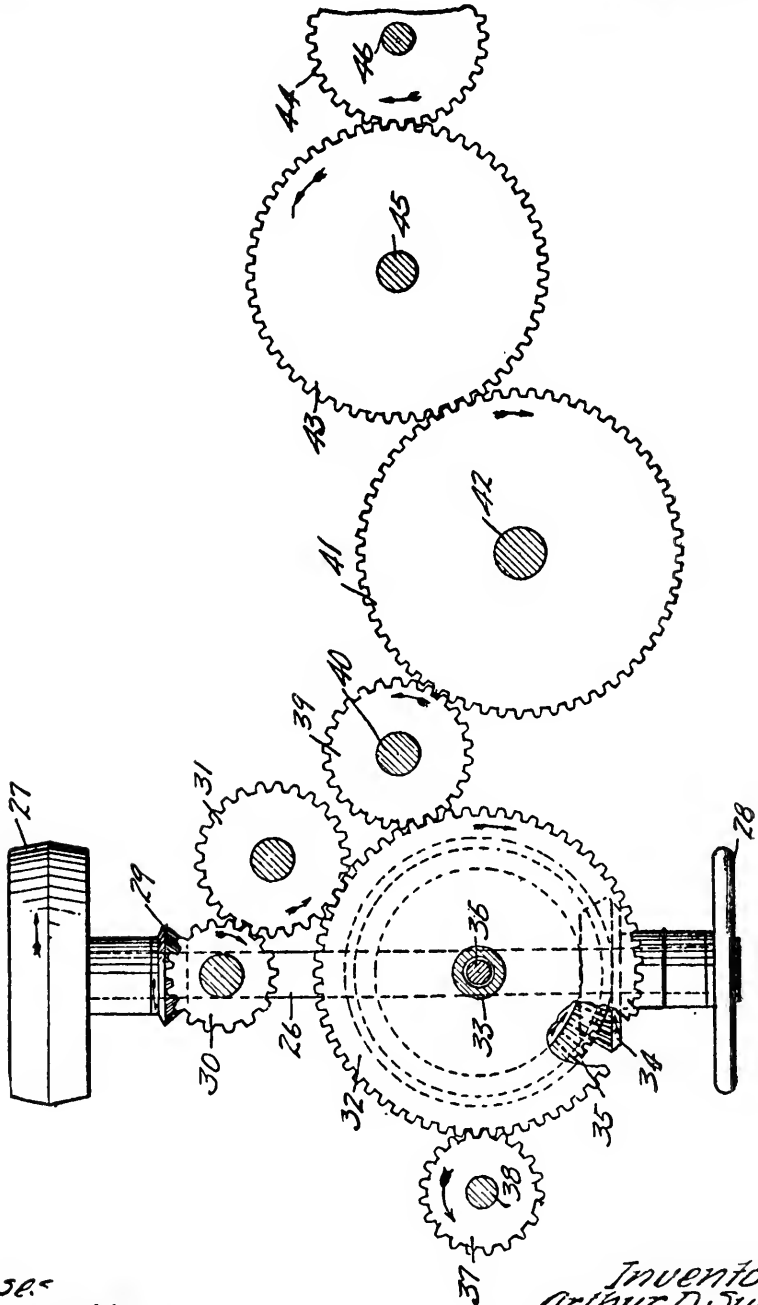
Inventors.
Arthur D. Sumner.
Ray O. Wilson.
Howard Stausser
Attys.

R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914

1,203,295.

Patented Oct. 31, 1916.
9 SHEETS—SHEET 4.

Fig. 5.



Witnesses:
James M. Abbot
R. S. Berry

Inventors:
Arthur D. Sumner
Roy O. Wilson.
By *James Strouse*
Att'ys.

R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914.

1,203,295.

Patented Oct. 31, 1916.
9 SHEETS—SHEET 5.

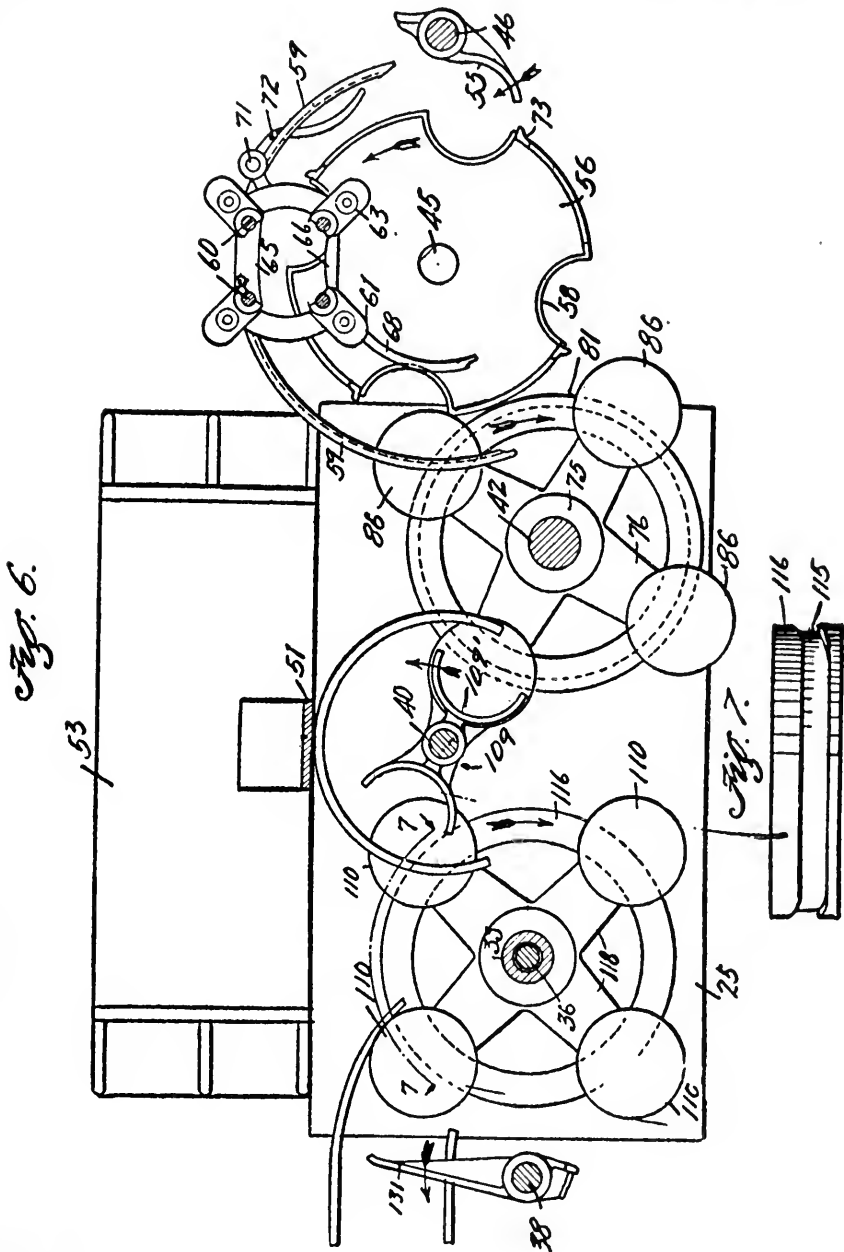


Fig. 6.

Fig. 7.

Witnesses.
James M. Albert
A. S. Bunn

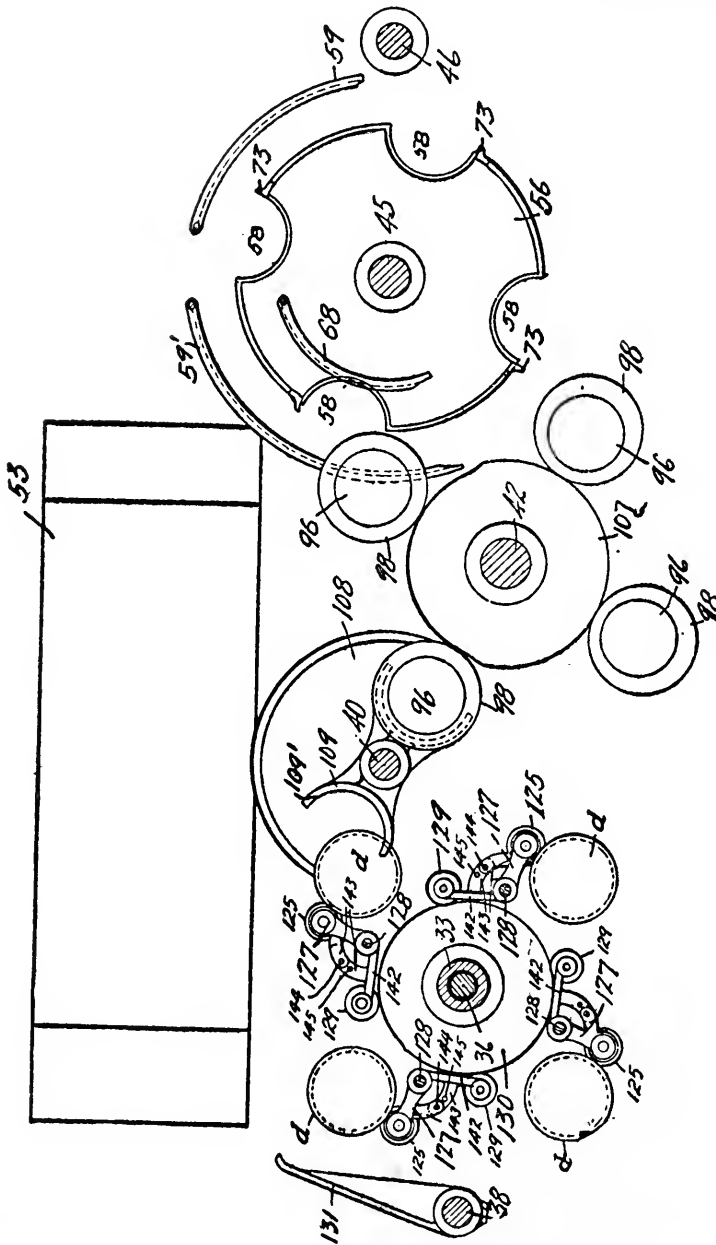
Inventors.
Arthur D. Sumner.
Ray O. Wilson.
By
Harold Strauss
Attys.

R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914.

1,203,295.

Patented Oct. 31, 1916.
9 SHEETS—SHEET 6.

Fig. 8.



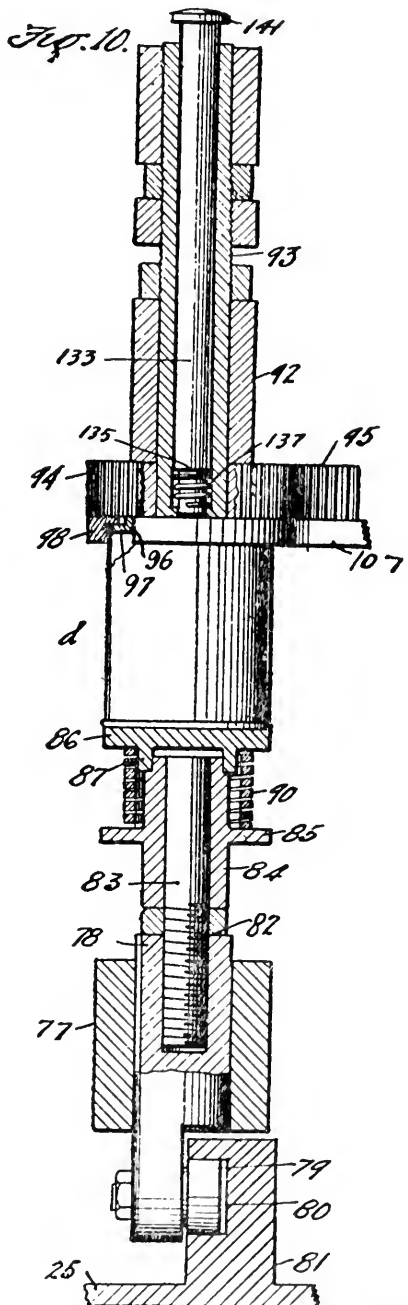
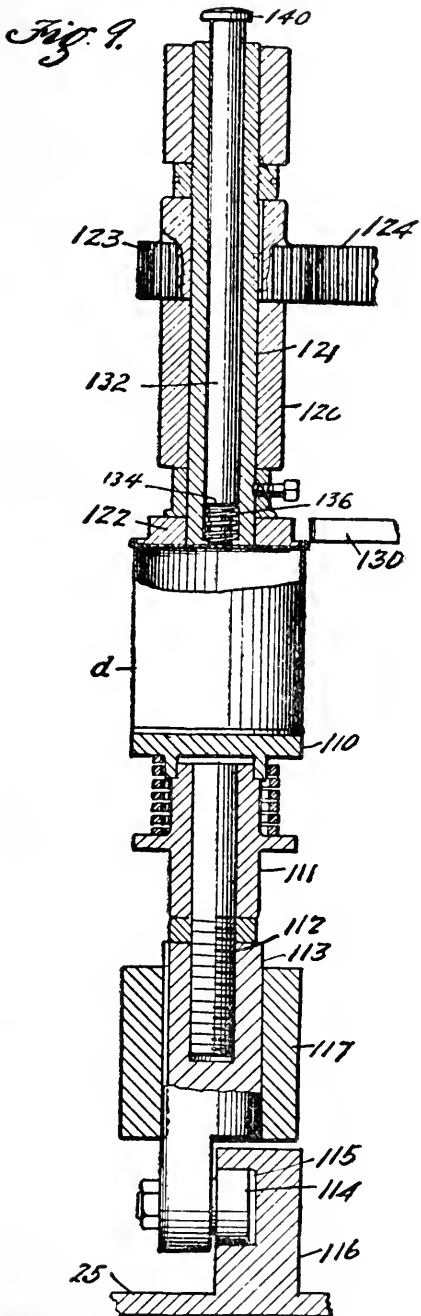
Witnesses.
James M. Abbott
A. S. Burns

Inventors.
Arthur D. Sumner
Ray O. Wilson.
By
Harold Staus
Attys.

R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914.

1,203,295.

Patented Oct. 31, 1916.
9 SHEETS—SHEET 7.



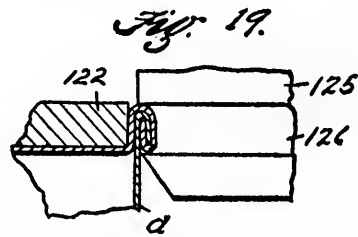
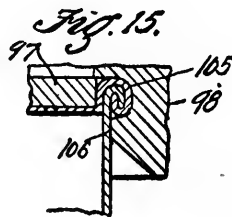
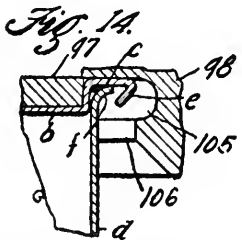
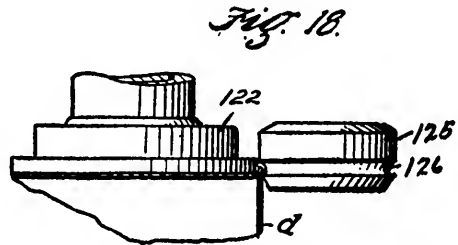
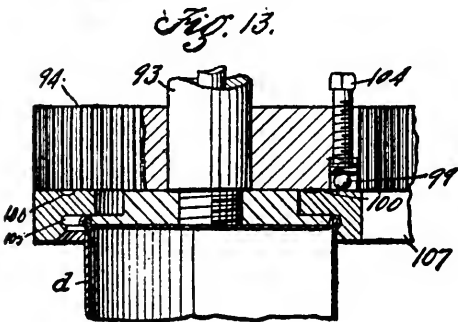
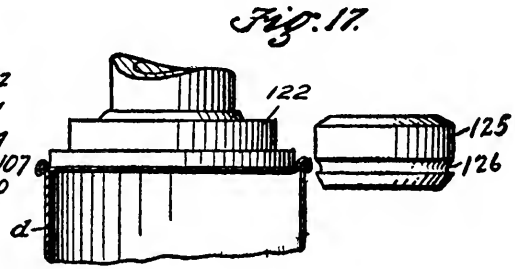
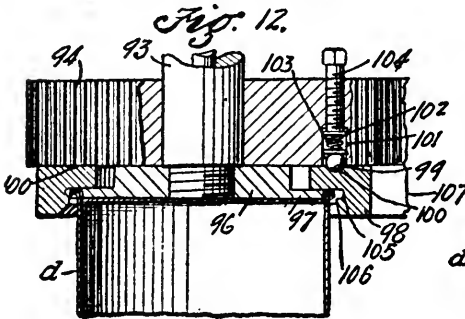
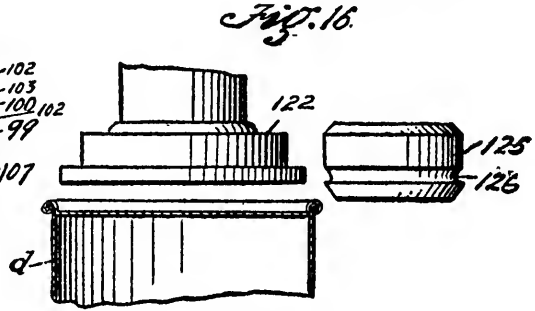
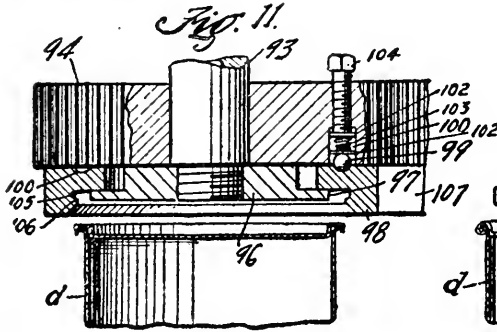
Witnesses.
James M. Albert
O. S. Burg.

Inventors.
Arthur D. Sumner
Ray O. Wilson.
By Howard J. ...
11145

R. O. WILSON & A. D. SUMNER.
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10, 1914.

Patented Oct. 31, 1916.
9 SHEETS—SHEET 8

1,203,295.



Witnesses:
James M. Aldred
R. S. Berry

Inventors:
134
Arthur D. Sumner
Ray O. Wilson
Harold Staus
Attys

H. O. WILSON & A. D. SUMNER
CAN HEADING MACHINE.
APPLICATION FILED AUG. 10. 1914.

1,203,295.

Patented Oct. 31, 1916
9 SHEETS—SHEET 9

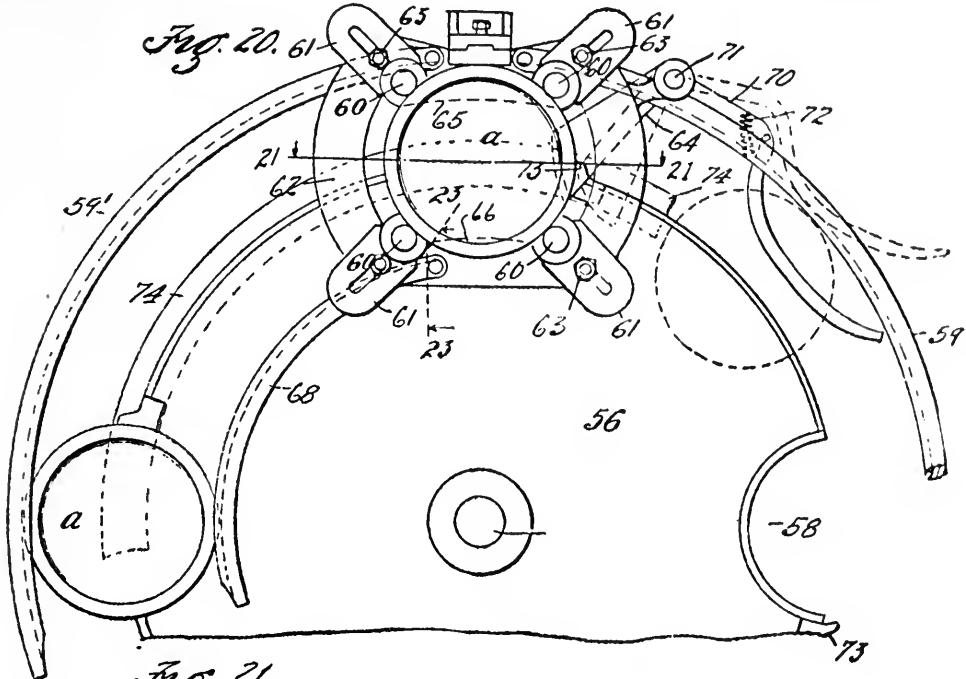


Fig. 21.

Fig. 22.

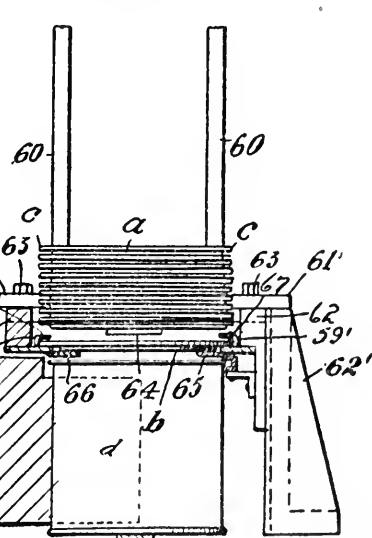
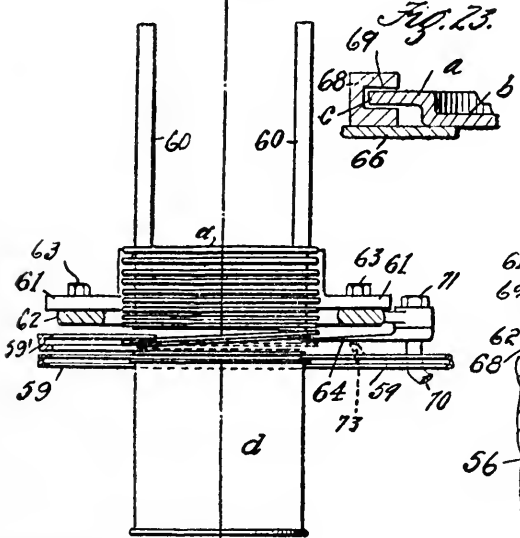
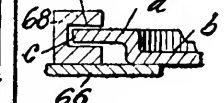


Fig. 23.



Witnesses
James M. Albert
R. J. Brown

Inventors.
Arthur D. Sumner.
Ray O. Wilson.
By
Harold Stinson
Attys.

UNITED STATES PATENT OFFICE.

**RAY O. WILSON AND ARTHUR D. SUMNER, OF LOS ANGELES, CALIFORNIA,
ASSIGNORS OF THIRTY ONE-HUNDREDTHS TO SAID WILSON, THIRTY
ONE-HUNDREDTHS TO SAID SUMNER, AND FORTY ONE-HUNDREDTHS TO
F. F. STETSON, OF LOS ANGELES, CALIFORNIA.**

CAN-HEADING MACHINE.

1,203,295.

Specification of Letters Patent.

Patented Oct. 31, 1916.

Application filed August 10, 1914. Serial No. 856,117.

To all whom it may concern:

Be it known that we, RAY O. WILSON and ARTHUR D. SUMNER, both citizens of the United States, residing at Los Angeles, in the county of Los Angeles, State of California, have invented new and useful Improvements in Can-Heading Machines, of which the following is a specification.

This invention relates to a can heading machine, and particularly pertains to a mechanism for double seaming the ends or caps on metal cans.

It is the object of this invention to provide a can heading machine for placing the bottom ends on cans in the manufacture of the same and for double seaming the covers on the cans after the materials to be contained in the can have been placed therein, and the particular object is to provide a machine of this character which is continuous in operation, that is, in which the can is conveyed continuously through the machine in the heading operation without stop and start movements.

A further object is to provide a can heading machine which, by reason of a continuous and non-intermittent progress of cans therethrough, is capable of a more rapid and consequently larger output than is effected by most can heading machines now generally in use.

A further object is to provide a can heading machine in which a large number of cans will be operated on simultaneously and advanced continuously through the machine without interruption.

A further object is to provide a can heading machine which is compact so as to occupy small floor space and in which the parts are so arranged as to be readily accessible for removal, repairs or adjustment.

A further object is to provide means for feeding the ends of the cans to the can bodies and to provide means whereby the can body and the top therefor are delivered simultaneously to the primary seam forming mechanism.

A further object is to provide a seaming mechanism by which the joints between the can body and ends will be effectively sealed by spinning the contiguous edges of the can body and can-top together in a double seam,

and which is effected while the can is advancing through the machine.

The invention is illustrated in the accompanying drawings, in which:

Figure 1 is a plan view of the can heading machine with end portions thereof broken away. Fig. 2 is a side elevation of same. Fig. 3 is a vertical section on the line 3—3 of Fig. 2, as seen in the direction indicated by the arrows. Fig. 4 is a vertical section on the line 4—4 of Fig. 2, as seen in the direction indicated by the arrows. Fig. 5 is a horizontal section on the line 5—5 of Fig. 2, illustrating the driving gears and indicating by arrows the direction of rotation of same. Fig. 6 is a horizontal section on the line 6—6 of Fig. 2, showing the can advancing mechanism. Fig. 7 is a detail in elevation of one of the stationary cam disks showing the formation of the cam groove on the periphery thereof, as seen on the line 7—7 of Fig. 6 in the direction indicated by the arrows. Fig. 8 is a diagrammatic view illustrating the movements of the can and the actions thereon during the double seaming operation. Fig. 9 is an enlarged detail section on the line 9—9 of Fig. 2, partly in elevation showing a can in position on the final double seamer. Fig. 10 is an enlarged detail vertical section on the line 10—10 of Fig. 2, illustrating the can in position on the initial seamer. Figs. 11, 12 and 13 are details in section of the initial seamer illustrating the manner in which the primary seam is formed between the can body and head. Figs. 14 and 15 are detail sections illustrating the manner of forming the initial seam on the can by the mechanism illustrated in Figs. 11, 12 and 13. Figs. 16, 17 and 18 are views illustrating the final seaming operation on the can and showing the method for effecting same. Fig. 19 is an enlarged detail showing the double seam between the can head and body as completed by the mechanism shown in Figs. 16, 17 and 18. Fig. 20 is an enlarged detail in plan of the can top seaming mechanism. Fig. 21 is a section and elevation on the line 21—21 of Fig. 20 illustrating the can tops as normally positioned in the can top feeding device. Fig. 22 is a vertical section on the line 22—22 of Fig. 21 showing a can top

as delivered from the can top feeding mechanism. Fig. 23 is a detail section on the line 23—23 of Fig. 20, showing a can top positioned on the supporting plate at one side thereof.

More specifically, 25 indicates the stationary bed or base of the machine, which may be of any suitable construction, and which forms the main support of the various portions of the machine. Mounted in suitable bearings on the base 25 is a drive shaft 26 (reference being had to Fig. 5) which is fitted with a belt pulley 27 at one end thereof from which it may be rotated continuously from any suitable source of power; the opposite end of the drive shaft 26 being provided with a hand wheel 28 by means of which it may be rotated manually when it is desired to adjust the positions of the various parts controlled thereby when the machine is not in operation.

Mounted on the drive shaft 26 is a beveled pinion 29 meshing with a corresponding pinion on the underside of a spur gear 30, which in turn meshes with an idler gear 31 meshing with a large gear 32 mounted on a vertically extending tubular shaft 33; the gears 30 and 31 constituting speed reduction gears. A second beveled pinion 34 is mounted on the drive shaft 26 and meshes with a beveled gear 35 mounted on a shaft 36 which extends upwardly through the tubular shaft 33. Meshing with the gear 32 on one side thereof is a gear 37 on a vertical shaft 38 and meshing with the gear 32 on the side opposite the gear 37 is a gear 39 on a shaft 40, which gear 39 also meshes with a large gear wheel 41 on a shaft 42. A gear wheel 43 of a diameter slightly less than that of the gear wheel 41 meshes with the latter and also with a smaller gear 44; the gear 43 being mounted on a shaft 45 and the gear 44 on a shaft 46.

The tubular shaft 33, shaft 40 and shaft 42 extend upwardly through bearings 47, 48 and 49 carried by brackets 50, 51 and 52 respectively carried on an elevated portion 53 of the base 25, and the shafts 38, 45 and 46 are carried upward through suitably mounted bearings. The shaft 46 extends above a can receiving and feeding table 54 which is secured to the shaft 46 and revoluble therewith, and rigidly mounted on the upper end of the shaft 46 is a pair of curved can engaging arms 55 extending on opposite sides of the sides of the shaft 46 adjacent the surface of the revoluble table 54. The shaft 45 has a horizontally extending can feeding wheel 56 mounted thereon which wheel is arranged immediately above the table 54 and is formed with a plurality of can receiving pockets 58 on its vertical edge which pockets are approximately semi-cylindrical and are adapted to engage the sides of cans fed thereto by means of the arms

55; the wheel 56 and the arms 55 being rotated in opposite directions and at such speeds in relation to each other that a can advanced by an arm 55 will be moved into a pocket 58 on the wheel 56 and carried around to the initial seam forming mechanism later described. A curved guide rail 59 is arranged concentric with the wheel 56 and spaced therefrom and is adapted to engage the outer portions of the cans to maintain them in position in the pockets 58 as the wheel 56 revolves; this guide rail extending approximately half way around the wheel 56 on a plane below the upper face of the latter.

Means are provided for automatically feeding the can-tops to the cans as they are advanced by the wheel 56, which means is particularly illustrated in Figs. 20, 21 and 22, and includes a series of four upright guide members 60 arranged on the corners of a rectangle and between which the can-tops are arranged in a stack; the guide members 60 being carried on horizontally extending slotted plates 61 supported on brackets 62 and adapted to be rigidly secured to the latter by means of bolts 63 which pass through the slots in the plates 61; the plates 61 being adapted to be adjusted to position the guide members 60 to accommodate can-tops —*a*— of various diameters and to position them in proper relation to the cans advanced by the wheel 56. The brackets 62 are carried on a standard 62' shown in Fig. 22. The guide members 60 are so arranged as to dispose the can-tops stacked therebetween immediately over the pockets 58 on the wheel 56 so that when a can-top is discharged from the stack, as will presently be described, it will be deposited immediately above a can being advanced by the wheel.

The can tops *a* are supported between the guide members 60 by means of a plate 64 which engages the edge of the lowermost can top, as shown in Fig. 21; the opposite edge of the lowermost can top extending downward toward a pair of spaced supporting plates 65 and 66, with the depressed portion *b* of the can top resting on the supporting plates 65 and 66 so that on withdrawal of the plate 64 from beneath the can top it will drop and be supported entirely on the plates 64 and 65, as shown in dotted lines in Fig. 21 and in full lines in Fig. 22.

The plates 65 and 66 are mounted on the undersides of the brackets 62 above the wheel 56 and the guide rail 59; the plate 65 connecting with the curved guide rail 59' arranged above the guide rail 59 with its upper face flush with the underside of the lower wall of a groove 67 formed on the inner face of the guide rail 59', and the plate 66 connects with a curved rail 68 having a groove 69 on its inner face and arranged concentric with the curved rail 59' on a

plane therewith. The grooves 67 and 69 are designed to receive peripheral flanges —c— formed on the can-tops —a— to support the can-tops clear of the cans —d— as the latter are advanced by the wheel 56. The plate 64 is mounted on a curved arm 70 pivoted at 71 on a lug on the bracket 62; the outer end portion of the arm 70 being curved inwardly beneath the rail 59 to extend in the path of travel of the can advanced by the wheel 56 in such manner that the can will operate to rock the arm 70 on its pivot 71 to withdraw the plate 64 out of engagement with the lower can-top —a— and cause the latter to drop and be supported solely on the plates 65 and 66. The arm 70 will be moved by the action of the can as indicated in dotted lines in Fig. 20 and will be restored to its normal position by means of a spring 72; the plate 64 on returning to its normal position engaging the flange —c— of the can top —a— arranged immediately above the can top previously dropped onto the plates 65 and 66. The forward edge of the plate 64 is formed with an inclined face which on engaging the edge of the can-top will act to slightly elevate that edge of the can-top so that can-top engaging members 73 carried by the wheel 56 will clear the can-top supported on the plate 64 and will engage the lowermost can-top supported on the plates 65 and 66.

The can-top engaging members 73 comprise outwardly and upwardly projecting fingers mounted on the upper edge of the wheel 56 to one side of the pockets 58; a can-top engaging member 73 being mounted at the upper outer edge of each pocket 58 as shown in Fig. 1, and operating when the wheel 56 is revolved, when a can is positioned in the pocket 58 to actuate the lever 70, to engage the can-top released by the plate 64, and advance the can-top along the grooves 67 and 69 formed in the rails 59' and 68 respectively. The can-tops will thus be advanced with the wheel 56 directly above the cans in the pockets 58 and will be spaced therefrom by reason of the can-top being supported on the rails 59' and 68 above the outer edge of the wheel 56, and above the top of the cans; the cans —d— being supported on an upwardly inclined rail 74 extending beneath the outer edge of the wheel 56 on the path of travel of the cans carried by the latter, and terminating at its lower end adjacent the table 54. The can-tops are thus supported clear of the contents of the cans which, frequently project above the upper edges of the cans, the cans, however, being gradually moved upward toward the can-top as it is advanced along the upwardly inclined can supporting rail 74 until the can and the top therefor are discharged from engagement with the wheel 56, as will presently be described.

Rigidly mounted on the shaft 42 is a collar 75 on which a series of four radiating brackets 76 are formed and on the outer ends of which brackets sleeves 77 are mounted, which sleeves form guides for vertically reciprocal stems 78, the lower ends of which are fitted with rollers 79 extending into a cam groove 80 formed on an annular flange 81 formed on the base 25 and encircling the shaft 42 concentric therewith. Each of the stems 78 is formed with an internally threaded bore 82 to receive a threaded stud 83 adapted to be adjusted vertically in relation to the stem and on which stud a collar 84 is rotatably mounted. The collar 84 is formed with an annular flange 85 intermediate its ends and has a disk 86 forming a chuck on its upper end; the disk 86 being formed with an annular depending flange 87 adapted to slidably engage the upper end of the collar 84. Depending bolts 88 on the disk 86 pass through apertures in the flange 85 and are formed with heads 89 which are adapted to engage the underside of the flange 85 to limit the upward movement of the disk 86. The disk or chuck 86 thus has reciprocal and rotary movement in relation to the stem 78. A coiled spring 90 is interposed between the disk 86 and the flange 85 to normally maintain the disk 86 in its uppermost position and to provide a resilient seat therefor. The upper faces of the disks 86 are arranged on a plane with the upper end of the inclined rail 74 which terminates adjacent the path of travel of the outer edges of the disks 86 as the latter are advanced on the rotation of the shaft 42.

Rigidly mounted on the upper end of the shaft 42 is a cross head 91 comprising a series of radiating arms carrying sleeves 92 in which vertical tubular spindles 93 are revolubly mounted. A series of four of these spindles 93 and their bearings 92 are provided and on the lower end of each spindle 93 is a pinion 94 which meshes with a fixed gear 95 rigidly mounted on the bearing 49. Mounted on the underside of each pinion 94 and secured to the spindle 93 is a disk 96 which is formed with an outwardly extending flange 97 on its outer edge to receive a ring 98 which is slidable on the flange 97 and is normally disposed concentric with the disk 96 and the spindle 93 by means of a spring pressed ball 99 adapted to seat in an annular channel 100 formed on the upper face of the ring 98; a socket 101 being formed in the pinion 94 to receive the ball 99 and a pair of washers 102 between which a spring 103 is interposed.

A set screw 104 is mounted in the pinion 94 and bears against the upper washer 102 and is adapted to be adjusted so as to vary the tension of the spring 103.

The ring 98 is formed with an annular groove 105 on an offset portion of its inner

wall, the lower edge of which groove is formed by a flange 106 having an outwardly diverging lower face. This ring 98 constitutes an initial seaming device and is designed to be normally disposed immediately above the can receiving disk 86 so as to engage the top of the can supported on the disk 86, as particularly shown in Fig. 10; a seaming ring 98 being positioned over each of the disks 86. The disk 96 is adapted to engage the top —*a*— of the can as particularly shown in Figs. 12 and 13, and operates to rotate the can when the gear 94 is revolved by being carried around the stationary gear 45 on the rotation of the shaft 42.

The rings 98 are adapted to be actuated on the rotating of the cross head 91 to engage the flanges —*c*— on the can covers —*a*— and turn a lip —*e*— on the flange —*c*— beneath an annular flange —*f*— on the top of the can, as shown in Figs. 14 and 15. The actuation of the rings 98 is effected by means of a cam disk 107 rigidly mounted on the underside of the stationary gear 95; the cam disk 107 having an arcuate face eccentric to the center of the shaft 42 on which the outer faces of the seaming rings 98 are adapted to bear, when performing the seam forming operation and having a concentric arcuate face which engages the rings as the gears 94 are rotated to position the rings concentric with the gears 94. When thus disposed they are engaged by the centering balls 99 so that the rings will be positioned concentric with the cans when the latter are fed to the disks 86 from the can feeding wheel 56. The disks 86 and the cross head 91 form a carriage for advancing the cans, which on being carried around by the rotation of the shaft 42 receive the initial seaming operation just described and as shown in Figs. 14 and 15, and are then subjected to a second operation, being delivered from the can receiving disks 86 to a platform 108 by means of an arm 109 mounted on the shaft 40; the arm 109 having a semi-circular end portion 109' adapted to engage the cans on the disks 86 and remove them from the latter. In order to permit the removal of the cans from the disks 86 the latter are moved downwardly by the action of the cam groove 80 on the flange 81 which allows the stems 78 to gravitate downward and withdraw the upper end of the cans on the disks 86 clear of the seaming ring 98.

The can engaged by the arm 109 is advanced over the platform 108 and is delivered to a disk 110 reciprocally mounted on a collar 111 rotatably mounted on a stud 112 carried by a reciprocal stem 113 having a roller 114 on its lower end engaged in a cam groove 115 on a flange 116 carried by the base 25 and formed concentric with the shaft 33. A series of four of the disks 110

and their mountings are provided and the stems 113 are slidably engaged by sleeves 117 carried on brackets 118 secured to the tubular shaft 33.

Mounted on the upper end of the tubular shaft 33 is a cross head 119 having a series of sleeves 120 forming bearings for tubular spindles 121 on the lower ends of which disks 122 are rigidly mounted; a disk 122 being disposed above each of the can receiving disks 110 and adapted to engage the tops of the cans delivered to the disks 110. The tubular shafts 121 are provided with gears 123 which mesh with a large gear 124 mounted on the shaft 36 extending through the tubular shaft 33. The shafts 33 and 36 are designed to be rotated in opposite directions so that the speed of rotation of the spindles 121 will be increased without the use of an excessively large gear 124 or reduced pinions 123.

The cans carried around by the disks 110 and 122 are designed to be subjected to the action of ordinary double seam compressing rollers 125 formed with annular grooves 126 thereon adapted to engage the seams on the upper edges of the cans as shown in Fig. 19. The double seam compressing rollers 125 are mounted upon bell crank lever arms 127 pivoted at 128 to the cross head 119; the bell crank arms 127 being provided with wheels 129 adapted to traverse a cam disk 130 rigidly mounted on the bearing 47; the cam disk 130 having an eccentric cam face by which the bell crank arms 127 are rocked to gradually increase the pressure of the can seam compressing rollers 125 on the can seam and crowd the seam against the disk 122 as the can is rapidly revolved by the latter, and thereby complete the seaming operation.

The can after being subjected to the action of the seam compressing rollers 125 are ejected from the disks 110 by means of arms 131 mounted on the shaft 38 and adapted to engage the can bodies and shove them off the can supporting disks 110 onto a suitable conveyer, not shown; the disks 110 moving into a lower position when the cans are engaged by the arms 131 so as to move the heads of the cans clear of the disks 122. The downward movement of the disks 110 is effected by the rollers 114 on the stems 113 moving downward in the cam groove 115 on the flange 116.

As a means for insuring the release of the cans from the disk 122 and the disks 96, stems 132 and 133 are mounted in the tubular shafts 121 and 93 respectively; the lower ends of the stems 132 and 133 being formed with shoulders 134 and 135 which are engaged by springs 136 and 137 supported upon inturned flanges on the lower ends of the shafts 121 and 93.

The springs 136 and 137 operate to nor-

mally maintain the stems 132 and 133 in an uppermost position with the lower ends of the stems above the lower faces of the disks 122 and 96 and out of contact with the can-
 5 top engaged by the disk. These stems 132 and 133 are designed to be depressed in opposition to the springs 136 and 137 to force the cans out of engagement with the disks 122 and 96 the moment the can supporting
 10 disks 110 and 86 are lowered by the action of the cam groove 115 and 80 on the rollers 114 and 79. The depression of the stems 132 and 133 is accomplished by means of stationary arms 138 and 139 mounted on stand-
 15 ards carried by the base portion 53 which arms project in the path of travel of the upper ends of the stems 132 and 133 at points immediately above the points where the can supporting disks 110 and 86 are
 20 lowered in such manner that the stems 132 and 133 will be engaged by the arms 138 and 139 and thereby be suddenly depressed so as to impact against the head of the can.

The upper ends of the stems 132 and 133 project a short distance above the upper ends of the tubular shaft 121 and 93 and are formed with heads 140 and 141 respectively which have crowned upper faces which are engaged by curved lower faces on
 30 the arms 138 and 139.

As a means for permitting a slight relative movement of the arms of the bell crank arms 127 carrying the seaming rollers 125 and the cam engaging wheels 129 to permit
 35 the seaming rollers 125 to pass over the joint in the sides of the can body the arms 142 carrying the wheels 129 are formed of a resilient metal such as steel having sufficient rigidity to insure a proper seaming
 40 action of the rollers 125 but which will yield when subjected to the pressure thereon caused by the seaming rollers 125 passing over the can seam. To permit adjustment of the rollers 125 and the wheels 129 in relation
 45 to each other to accommodate them to cans of different diameters the arms carrying the rollers 125 are constructed to be adjusted to various angles in relation to the arms 142. To effect this adjustment, said arms are
 50 mounted separately on the pivot pins 128 and are formed with overlapping flanges 143 adapted to be secured together with the arms in a desired angular position in relation to each other by means of pins 144 extending through an aperture in the upper-
 55 most flange and adapted to engage any one of a series of apertures 145 formed in the lowermost flange on an arc of a circle concentric with the pivot pin 128.

In the operation of the invention, the drive shaft 26 is rotated continuously from any suitable source of power, thus effecting a continuous rotation of the shafts 33, 36, 38, 40, 42, 45 and 46 through the medium
 65 of the gears 29, 30, 31, 32, 34, 35, 37, 39, 41,

43 and 44, which are rotated in the directions indicated by the arrows in Fig. 5. This effects a continuous rotation of the arms 55 on the shaft 46, can feeding wheel 56 and shaft 45, the brackets 76 and cross
 70 head 91 on the shaft 42 carrying the primary seam forming mechanism, the arms 109 on the shaft 40, the brackets 118 and cross head 119 on the tubular shaft 33 carrying the final seaming mechanism, the gear
 75 124 on the shaft 36 for accelerating the gears 123, and the arms 131 on the shaft 38.

It will now be seen that a can fed to the arms 55 will be advanced continuously during its travel through the machine and by
 80 reason of no intermittent movement of the can or the rotating parts conveying same that the can may be passed through the machine and subjected to the heading action thereof at a high speed, thus producing a
 85 machine that is capable of a rapid output.

The operations on the can are as follows: On its being engaged by the arms 55 it is advanced into a pocket 58 on the wheel 56 and carried around by the latter into the
 90 passage inside of the guide rail 59. The body of the can on striking the arm 70 rocks the latter on its pivot 71 and moves the plate 64 from beneath a can-top —*a*— so that the forward edge of the latter will
 95 drop as before described into the path of travel of the finger 73 on the wheel 56 at the rear edge of the pocket 58 carrying the can. The finger 73 will then carry the can-top —*a*— into the grooves 67 and 69 on the
 100 rails 59' and 68 with the can-top positioned directly above the can.

The can is supported on the inclined rail 74 and is moved by the wheel 56 into position over a can supporting disk 86 which
 105 is moved beneath the can by the rotation of the shaft 42 at a speed corresponding to that of the can; the can and the disk 86 registering coincidentally when alined between the shafts 42 and 45. The disk 86 is then elevated by the action of the cam groove 80 on the roller 79, thereby causing the disk 86 to engage the lower end of the can and raise it into engagement with the can-top there-
 110 above; the movement of the disk 86 being sufficient to carry the can-top into engagement with the disk 96. Sufficient pressure is exerted on the can between the disk 86 and the disk 96 that the rotation of the latter will operate to spin the can as it is advanced
 120 with the disk 86 and carried out of the pocket 58 on the wheel 56. While the can is being thus spun the seam forming ring 98 will be actuated by the cam 107 and moved into engagement with the lip —*c*— and
 125 flange —*c*— on the can top so as to bend the lip —*c*— beneath the flange —*f*— on the upper edge of the can body as shown in Fig. 15. The can will then be discharged from the disk 86 as before described and
 130

conveyed by the rotating arms 109 onto a disk 110 where it is engaged by the rapidly rotating disk 122 and spun while being advanced by the rotation of the shaft 33. The seaming roller 125 will then be caused to press against the seam between the can-top and can body by the action of the cam 130 as previously described, during a partial revolution of the shaft 33; the can being spun rapidly a number of revolutions during this action. On completion of this operation the can will be ejected from the disk 110 by the arm 131, as before described, with the can-top effectively secured thereto.

What we claim is:

1. In a can heading machine, a continuously revoluble member, a series of spindles thereon, disks on said spindles, means for rotating the spindles by the rotation of the revoluble member, means for clamping a can-top and can against each of the disks to cause the cans to rotate as they are advanced by the revoluble member, means encircling and forming a seam between the can-top and can while it is being advanced a partial revolution of the revoluble member, means for automatically removing the can from the revoluble member, continuous can advancing means adapted to receive the cans from said removing means, and means for rolling the seam between the can-top and can while it is being advanced continuously.

2. In a can heading machine, a revoluble carriage, vertically reciprocal can supporting means on said carriage, means for coincidentally delivering can-tops and cans to the can supporting means while the carriage is rotating, means encircling the can top for forming seams between the can tops and cans while they are advancing on a partial revolution of the carriage, a second revoluble carriage, means for supporting cans on said second carriage, means for transferring the cans from the supporting means on one carriage to the supporting means on the other carriage, and means controlled by the rotation of the second carriage for rolling the seam formed between the can-tops and cans on the first carriage.

3. In a can heading machine, a pair of revoluble shafts, means for rotating said shafts continuously, a series of sleeves carried by each of said shafts, stems reciprocally mounted in said sleeves, means for reciprocating said stems on the rotation of the shafts, can supporting means carried by said stems, cross heads carried by said shafts, spindles revolvably mounted in said cross heads in alignment with the reciprocal stems, can-top encircling and engaging disks on said spindles, means for delivering can-tops and cans continuously between the supporting means and the disks carried by one of said shafts, means on said disks for forming seams between the can-tops and cans as they are advanced by a

partial revolution of said last named shaft, means for automatically transposing the cans from the supporting means carried by one shaft to the supporting means carried by the other shaft, and means controlled by the rotation of the second shaft for rolling the seams between the can-tops and cans.

4. In a can heading machine, a pair of parallel vertically extending shafts one of which is tubular, means for rotating said shafts continuously in corresponding directions, a third shaft extending through the tubular shaft adapted to be rotated in a reverse direction in relation to said tubular shaft, a gear mounted on the third shaft, a cross head on the tubular shaft, a series of spindles on said cross head, pinions on said spindles meshing with the gear on the third shaft, can top engaging means on said spindles, seam rolling means carried by said cross head cooperating with the can top engaging means to roll the seams between the can tops and can bodies as they are spun by the rotation of said spindles during a partial revolution of the tubular shaft, means for supporting the cans to position the tops in operative relation to the seam rolling means, means on the other shaft for forming a seam between the can top and can body during a partial revolution of the shaft and while it is in motion, and means for transferring the cans from the seam forming means to the seam rolling means.

5. In a can heading machine, a continuously revoluble can conveying carriage, means movable with said carriage adapted to encircle and form a double seam between a can top and can body, means for spinning the can when encircled by the seaming means, a second continuously revoluble can conveying carriage, means on said second carriage for rolling the seam formed on the first carriage, and means for automatically passing the can from the first carriage to the second carriage.

6. In a can heading machine, a continuously revoluble can conveying carriage, means movable with said carriage adapted to encircle and form a double seam between a can top and can body, means for spinning the can when encircled by the seaming means, a second continuously revoluble can conveying carriage, means on said second carriage for rolling the seam formed on the first carriage, means for spinning the can during the seam rolling operation, and means for automatically passing the can from the first carriage to the second carriage.

7. In a can heading machine, a pair of rotary carriages, means for delivering cans and can tops continuously to one of said carriages, means on said last named carriage for encircling the can top and cans to form a double seam, means for spinning

the can and can top cooperating with said last named means, whereby the double seam is formed while the can is being advanced, means for conveying the can from one carriage to the other, seam rolling means on the other carriage, and means for spinning the cans to effect the seam rolling operation while the cans are being advanced.

8. In a can heading machine, a vertical shaft, a plurality of revoluble can supporting disks carried by said shaft, a stationary gear encircling said shaft, a series of pinions meshing with said gear and carried by said shaft in vertical axial alinement with the can supporting disks, means on said pinions adapted to encircle a can top and can carried on the supporting disk therebeneath to form a double seam between the can top and can body, and a stationary cam for cooperating with said last named means on the rotation of the shaft and the pinions to form a double seam.

9. In a can heading machine, a vertical shaft, a plurality of revoluble can supporting disks carried by said shaft, a stationary gear encircling said shaft, a series of pinions meshing with said gear and carried by said shaft in vertical axial alinement with the can supporting disks, means on said pinions adapted to encircle a can top and can carried on the supporting disk therebeneath to form a double seam between the can top and can body, a stationary cam for cooperating with said last named means on the rotation of the shaft and the pinions to form a double seam, a second shaft, revoluble can supporting means thereon, means for delivering the cans from the can supporting disks to the last named can supporting means, means for rotating the cans on their supporting means, and spring pressed rollers engageable with the double seam adapted to roll the latter on rotation of the last named shaft.

10. In a can heading machine, a vertical rotary shaft, a plurality of revoluble can supporting disks carried thereby, a series of spindles arranged in vertical alinement with the centers of said disks, bearings on said shaft in which said spindles are revolubly mounted, disks on said spindles opposite the can supporting disks, means for reciprocating the can supporting disks to clamp cans and can tops against the disks on the spindles, pinions on said spindles, a stationary gear concentric with the shaft engaging said pinions whereby the cans are spun on rotation of the shaft while advancing, and means on said pinions arranged to encircle the can top to form a double seam between the can top and can body.

11. In a can heading machine, a vertical rotary shaft, a plurality of revoluble can supporting disks carried thereby, a series of spindles arranged in vertical alinement

with the centers of said disks, bearings on said shaft in which said spindles are revolubly mounted, disks on said spindles opposite the can supporting disks, means for reciprocating the can supporting disks to clamp cans and can tops against the disks on the spindles, pinions on said spindles, a stationary gear concentric with the shaft engaging said pinions whereby the cans are spun on rotation of the shaft while advancing, means on said pinions arranged to encircle the can top to form a double seam between the can top and can body, comprising diametrically slidable seaming rings, and a stationary cam arranged to shift said rings as the cans are advanced.

12. In a can heading machine, a pair of revoluble shafts, a plurality of resiliently supported revoluble can supporting disks carried by each of said shafts, revoluble spindles carried by each of said shafts in vertical alinement with the axes of said disks, can top engaging disks on said spindles, means whereby the rotation of said shafts will rotate said spindles and thereby spin cans carried by the supporting disks, means controlled by the spindles carried by one of the shafts for forming a double seam between the can tops and can bodies, means cooperating with the disks on the spindle carried by the other shaft for rolling the seams, means for rotating the shafts continuously in unison, and means for transferring the cans from one set of disks to the other set of disks.

13. In a can heading machine, means for clamping a can body and can top together, means for advancing the can and can top while clamped, means for rotating the clamping means while advancing to spin the can and can top, and means encircling the can top for forming a double seam while the can and top are spinning and advancing.

14. In a can heading machine, means for clamping a can body and can top together, means for advancing the can and can top while clamped, means for rotating the clamping means while advancing to spin the can and can top, means encircling the can top for forming a double seam while the can is spinning and advancing, means for automatically removing the can and can top from the clamping means, and means for thereafter rolling the double seam while the can is being advanced.

15. In a can heading machine, means for clamping a can body and can top together, comprising a can top engaging disk and a resiliently mounted vertically reciprocal can supporting disk, means for advancing the clamping means, means for rotating the can top engaging disk to spin a can while advancing, and means encircling the can top for forming a double seam while the can is spinning and advancing.

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16. In a can heading machine, means for clamping a can body and can top together, comprising a can top engaging disk and a resiliently mounted vertically reciprocal supporting disk, means for advancing the clamping means, means for rotating the can top engaging disk to spin a can while advancing, means encircling the can top for forming a double seam while the can is spinning and advancing, means for automatically removing the can from between the disks, and means for thereafter rolling the double seam thereon while the can is advancing.

17. In a can heading machine, means for clamping a can body and can top together, comprising a can top engaging disk and a resiliently mounted vertically reciprocal can supporting disk, means for advancing the clamping means, means for rotating the can top engaging disk to spin a can while advancing, comprising a spindle on which the disk is mounted, a pinion on said spindle, and a stationary gear meshing with said pinion around which the latter is advanced, and means encircling the can top for form-

ing a double seam while the can is spinning and advancing.

18. In a can heading machine, a vertical revoluble shaft, a guide bearing carried in thereby, a vertical stem slidably carried in said bearing, means for reciprocating said stem as the shaft is rotated, a revoluble can supporting disk reciprocally mounted in relation to said stem, a can top engaging disk spaced from the can supporting disk, means for rotating the can top engaging disk as the shaft revolves to spin a can and can top interposed between the disks, and means carried by the can top engaging disk encircling the can top for forming a double seam between the can top and can body as the latter is spun while the shaft is rotated.

In witness that we claim the foregoing we have hereunto subscribed our names this 1st day of July, 1914.

RAY O. WILSON.
ARTHUR D. SUMNER.

Witnesses:

T. E. MONTEVERDE,
MARGUERITE BATES.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

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12. Amendment D, Jan. 31, 1916.
13. Power to Inspect 3/8/16.
14. Exr's Amendt. E, Oct. 18, 1916.
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TESTIMONY AND PROCEEDINGS ACCORDING TO DESIGNATIONS.

[1] 811 Washington Building,
Los Angeles, California, Thursday, December 21,
1922, 10:00 A. M.

[2] The MASTER.—This is a reference to hear and report and not to hear and determine.

[5] Mr. BLAKESLEE.—Ready. I wish to serve upon defendants affidavit of Reni S. Berry in reply to the affidavit by James Melville Abbett, expert for defendants, and to file the original.

(Document filed.)

[15] The MASTER.—I may say, Gentlemen, that while the association between Mr. Blakeslee and myself has been very close, he and I do not

always agree, and the only advantage he would have would be my knowledge of his mental processes and the confidence that he knows somewhat of patents and patent law. But I have equal confidence in Mr. Townsend. Mr. Townsend was brought to my attention first in the Patsy Romper case, as I recollect it, which was before this suit, and I believe at that time we had some conferences, even before I had met Mr. Blakeslee; and besides, Mr. Kelby is an old time Omaha friend, a friend of my father's, and when we come to balance the friendships, I call Mr. Kelby by [16] his first name the same as I call Mr. Blakeslee by a cognomen which is not one given him at the font. I don't think there would be any tendency which would be detrimental to either side, unless, perhaps a leaning over backwards to avoid giving any preference to the plaintiff, and I told Mr. Blakeslee frankly he would have to take that risk when he asked me if I was willing to serve. I also requested that they get into communication with Mr. Kelby and find whether it was satisfactory to defendants' counsel. I know they made some attempt, but whether it got through or not I couldn't say.

Now unless there is objection to proceeding I will consider the case ready for trial. I am ready to drop it, however, if there is any objection of any sort, personal or otherwise. After trying to read through that big patent I would just as soon let somebody else wrestle with it, because it is going to be a long, hard job, I believe; but I will give

it my best attention, gentlemen, if you desire to proceed.

Mr. TOWNSEND.—Your statement, your Honor, is satisfactory to the defendants.

[17] Mr. BLAKESLEE.—I wish to offer at this time in connection with my opening statement the certified file wrappers and contents of the patents now in suit which stand with the charge of infringement and ask that they be received, respectively, as:

Plaintiffs' Exhibit 1, Patent No. 1,301,348, as to which two of the claims are relied upon;

Plaintiffs' Exhibit 2, Patent No. 1,250,406, as to which only Claim 1 is relied upon; and

Plaintiffs' Exhibit 3, Patent No. 1,203,295, as to which all the claims are relied upon.

[52] Mr. BLAKESLEE.—We do not pretend to be pioneers; that will be conceded right now. Our claim is for a combination, an improvement in the art.

[68] 514 Post Office Building.

Los Angeles, California, Friday, December 22, 1922,
10:00 A. M.

[70] The MASTER.—The suggestion was made yesterday that the plaintiffs send over one of their machines to be put up beside that of the defendants. What do you think about that?

Mr. TOWNSEND.—Well, I think we had better get a little [71] further along with our proceedings here. I am not concerned with the plaintiffs' structure as yet, until further developments. Now if counsel for plaintiff will have his engineers ex-

amine these models and compare them with the patents, we may stipulate that they are correct models of the three patents in suit, and that would be a great saving of expense to us as it would avoid the necessity of bringing down the engineer and model maker from San Francisco who made them and who would be called simply for the purpose of saying they are true and correct and all that.

Mr. BLAKESLEE.—Right on that head, we cannot stipulate that, and I do not propose to, because we can see very clearly where this thing is heading. We shall at all times contend that unless this be used here merely as an illustrative model for the purpose of illustrating argument it is immaterial and improper evidence; that it could not represent the physical situation of a true embodiment of the device of the patent because it is not built so that it can be operated, there being too much lost motion and too much frailty in such a wooden model to permit it to perform with the niceties that a machinist must have to embody such a complicated invention, and we shall obstruct at all times its use in any manner in this suit except to illustrate argument. The plaintiffs submit that the Master should see the machine of the plaintiffs. The Master, having familiarized himself, as he has now, with these patents certainly is qualified to keep [72] within his mind any distinctions he may find between the patents in suit and the commercial structure of plaintiffs. It is always the custom of this Court to view the machines of both parties. It is not to be assumed that the Master

will be led astray by any such inspection, and it is bound to assist him. Now that is our position with respect to this model. We do not trust it as being probative of anything in this case, and we will not stipulate it. If counsel desires to put on somebody who is qualified to testify that in general or in certain respects it exemplifies or typifies or simulates the specific disclosure of the patents in suit, that evidence can be given the weight the Master desires to give it.

The MASTER.—Can't you stipulate that it simulates?

Mr. BLAKESLEE.—Yes, subject to proof as to how it simulates. Now counsel cannot put a belt on that machine and run it—

The MASTER.—That is self-evident.

Mr. BLAKESLEE.—Yes. And all the questions raised here about whether cans will spill or how the different parts will work and so forth cannot be established by any such frail and wobbly model as that. That is out of the question. Therefore we stand on the usual procedure in these cases and refuse to stipulate about any such model.

Now as to the matter of proof of infringement, counsel stated not quite fully what had taken place in the preliminary [73] proceedings in this litigation. Both sides brought on and there were argued possibly eight or ten motions for particulars by both sides. The net result of that has been the filing of blue-prints of defendants' structures, particularly blue-prints A, B, and E annexed to the affidavit of Defendant Guenther, and which are

connected with various of the bills of particulars, which are represented to be defendants' structure, to which we have applied the patents in suit as to parts of the patented construction. That is our principal and chief proof of infringement in this case.

Mr. TOWNSEND.—I didn't understand that.

Mr. BLAKESLEE.—I say those prints A, B, and E annexed to the bill of particulars—

The MASTER.—I think you should have the testimony of an expert to connect up those blue-prints, because as I take it, the bill of particulars is not evidence except as an admission.

Mr. BLAKESLEE.—A bill of particulars is not evidence, of course, like answers to interrogatories, but it is part of the pleadings.

Mr. TOWNSEND.—A bill of particulars is not part of the pleadings.

Mr. BLAKESLEE.—They are part of the pleadings.

Mr. TOWNSEND.—No, a bill of particulars is never a pleading.

Mr. BLAKESLEE.—Well, they are not evidence, but they are a part of the pleadings. Answers to interrogatories are [74] evidence.

The MASTER.—Are there any interrogatories here?

Mr. BLAKESLEE.—No. Interrogatories were prepared and were put aside in argument because we thought we had enough here in the bills of particulars. Now all of these bills of particulars, prints and annexed papers which have been filed in this

case as part of the evidence—and if the Court wishes a specific list of those I can read it into the record—

Mr. TOWNSEND.—Yes, you had better do that.

Mr. BLAKESLEE.—All right. First, on the plaintiffs' side,—

Mr. TOWNSEND.—Now, just a minute. We haven't got to that point yet.

Mr. BLAKESLEE.—Well, I think these ought to be in at this time.

Mr. TOWNSEND.—Yes, but don't anticipate that just for a minute.

The MASTER.—The defendants' interrogatories, then, may be excluded.

Mr. BLAKESLEE.—They were never answered; nor were the plaintiffs'.

The MASTER.—Now here is a bill of particulars filed June 6, 1922. Is that your first bill?

Mr. BLAKESLEE.—I have them in order here, on the plaintiffs' side. There is plaintiffs' bill of particulars dated June 5, 1922, and that applies the claims of the patents to [75] the blue-print.

The MASTER.—Here is one of April 17, 1922, blue-prints A, M, and B of defendants' machine.

Mr. BLAKESLEE.—Well, that will be among the defendants' papers. I have them segregated here as to the two patents.

Mr. TOWNSEND.—I just assume you have before you, your Honor, our bill of particulars with the affidavit there of Mr. Guenther on the matter.

Mr. BLAKESLEE.—The Court order was made on March 27.

The MASTER.—All right. What else?

Mr. BLAKESLEE.—Then the next is plaintiffs' bill of particulars of August 16, 1922.

Mr. TOWNSEND.—Have you omitted the bill of particulars we furnished on the 4th of May, 1922?

Mr. BLAKESLEE.—I am only going through the plaintiffs' bills of particulars now because I have them segregated here.

Mr. TOWNSEND.—The only thing is, this affidavit of Henry L. Guenther in the bill of particulars identifies and explains defendants' blue-prints A to G inclusive, and without that explanatory matter and the bill of particulars of defendants the bills of particulars later filed are without explanation.

Mr. BLAKESLEE.—Perhaps we can group them together; but my idea is to offer those of the plaintiffs first, and then we can offer those of the defendants and hook them up. Now August 16, 1922,—does your Honor find that? Of course I presume counsel will agree on the record—and I ask him now— [76] that each side reserve as to all these papers filed by the opposite side all objections to the relevancy, competency or materiality which may properly be urged before the Master or the Court as to any of same without particularizing. Is that satisfactory?

Mr. TOWNSEND.—I certainly want to enter an objection to the bills of particulars furnished on behalf of the plaintiffs as specifying their construction of the claims, particularly where such construction is set out in the bill of particulars and unsworn to, and therefore anonymous, as not proper evi-

dence, except as these particulars filed by plaintiffs are admissions by plaintiffs, but not binding upon defendants.

Mr. BLAKESLEE.—I have asked that the general objection stand, by each side as to the others. That ought to be a sufficient reservation. So that we can urge anything we wish to specifically. Is that satisfactory?

Mr. TOWNSEND.—Well, I think that is the substance of what I have said. This mental reservation stuff I am rather leary of. But the general objection is that these are simply to be taken as admissions against the parties filing them and are not necessarily binding on the other party. Now I don't know what other objections you could make, but that is the particular objection—

Mr. BLAKESLEE.—Well, that objection may be added to the general reservation of objections which I have specified, if you wish.

[77] Mr. TOWNSEND.—Have you any objections in mind that were made?

Mr. BLAKESLEE.—Yes, there were motions made to strike out portions, and certain of those matters were not finally passed upon. Now as we proceed we can deal with those as we come to them.

The MASTER.—I will receive them simply as admissions on the parts of the various parties and warn you to supplement them with testimony as to the facts that you desire for your own use.

Mr. BLAKESLEE.—But does your Honor wish us to substantiate each admission by testimony?

The MASTER.—No, not the admissions of the

other side; that is sufficient. I would suggest, though, that you call attention to those admissions that you desire to have considered. That will be done in argument.

Mr. BLAKESLEE.—Yes; in the argument we will refer, of course, to the specific admissions.

The MASTER.—Now I have here a bill of particulars of June 6, 1922, and I have found the one you referred to of August 18, 1922. Then on the other side are the blue-prints A and B of defendants' machines, filed April 17, 1922, and the affidavit of Henry L. Guenther re bill of particulars filed June 1, 1922, and defendants' bill of particulars of December 2, 1922.

Mr. BLAKESLEE.—When I take up the defendants' list those [78] can be easily checked.

Now the next is a bill of particulars furnished by plaintiff August 16, 1922. That is the one, evidently, dated the 18th. It was served on the 18th and I presume was filed on that date. Has your Honor found that one that was dated the 5th of June?

The MASTER.—Yes.

Mr. BLAKESLEE.—That is the plaintiffs' list. Now the defendants'—and Mr. Townsend can probably check these as I go through them.

Mr. TOWNSEND.—The Master has just called off mine.

The MASTER.—I gave them all, I think.

Mr. BLAKESLEE.—Well, there may be some others (examining papers). Defendants' Exhibit "A" is that print you have, your Honor.

The MASTER.—“A” and “B.”

Mr. BLAKESLEE.—Yes. Then defendants’ bill of particulars pursuant to order of Court made October 2, 1922.

The MASTER.—That is here.

Mr. BLAKESLEE.—Affidavit of Henry L. Guenther re bill of particulars, upon which we largely rely, dated the 27th day of May, 1922.

The MASTER.—Yes.

Mr. BLAKESLEE.—I think that completes it. There are no remainders over there?

The MASTER.—No; that is all. Now, Mr. Townsend, will [79] you proceed to finish your opening statement?

[93] Mr. BLAKESLEE.—I have not heard from Mr. Townsend as yet [94] as to what his desire is with regard to the stipulation concerning the Master’s fees, and I think, with due deference to the Master, we ought to have that ascertained and stipulated, if we can, before he spends many more hours on this reference.

Mr. TOWNSEND.—Your suggestion of yesterday was perfectly satisfactory to defendants, and I suggest that this proposed stipulation you have submitted be copied into and made a part of the record.

The MASTER.—Yes. There is one blank in there, and my suggestion was that that be filled in with \$250.

Mr. TOWNSEND.—Yes.

(The stipulation above referred to is as follows:)

“It is stipulated by the parties upon the reference of this matter to Charles C. Montgomery as Special

Master that the fees or compensation of the Special Master, at the rate of \$50.00 per day shall be advanced one-half each by the plaintiffs and defendants as the Master shall direct; said fees or compensation to be subject to approval and confirmation by the District Court and to be taxed by the District Court; each party hereto depositing with the Special Master at this date the sum of \$250.00 to apply on account of said compensation and fees.

It is further stipulated that the per diem fees, at the rate of \$10.00 per day, shall be paid to the stenographic reporter who shall be appointed by the Special Master, said [95] reporter's per diem fees to be paid upon bills from the said reporter in equal amounts by the parties and thereafter taxed as aforesaid.

It is further stipulated that the transcript of the proceedings shall be written up from day to day by the reporter and filed with the Special Master as a part of the records and files in this proceedings, and that the bills of the said reporter for said transcript shall be divided equally between the parties and paid by them at the usual and customary rate prevailing in the District Court, said expense to be taxed by the District Court upon the hearing of the Special Master's report. This provision applying only to the original transcript filed with the Special Master; it being understood that each party shall pay for its own carbon copy, if any be ordered."

[98] Now the term "spinning" means turning on its axis, and that word "spinning" must be applied as practical requirements make necessary.

[114] 811 Washington Building.

Los Angeles, California, Friday, December 22, 1922,
2:00 P. M.

Parties met at the office of the Special Master and proceeded at once to the plant of the Pacific Closing Machine Company, No. 324-6 San Fernando Avenue, Los Angeles, where, beginning at 2:30 o'clock P. M. (the following being present: The Special Master; Raymond Ives Blakeslee, Esq., counsel for plaintiffs; Charles E. Townsend, Esq., counsel for defendants; Mr. R. S. Berry, plaintiffs' expert; Mr. J. M. Abbett, defendants' expert; Mr. J. W. Weber, demonstrator and machinist of the Pacific Closing Machine Company, and the Reporter) the following proceedings were had:

An examination and discussion by parties above noted as present was had of a machine of plaintiffs' bearing the number D-233 upon the flange of the can-feed mechanism.

Mr. BLAKESLEE.—The said machine is offered in evidence as Plaintiffs' Exhibit 4, to remain constructively in the custody of the Master for all purposes of the proceeding on the reference to him as he may direct; and in connection with this offer the Pacific Closing Machine Company, through its Mr. A. G. Sumner, is enjoined to maintain said machine as far as within his control is possible in its present assembled condition until released by the Master or the Court.

Mr. TOWNSEND.—The receipt in evidence or consideration [115] of this machine is objected to on the grounds that it is manifestly so far a

departure from the patents in suit as not to be illustrative of said patents; and, further, as not showing any commercial use or commercial success of these patents or any of them, even though it is offered as such; and for the reason that it is such a departure from the so-called patented constructions represented by the patents here in suit.

Mr. BLAKESLEE.—In response we say that the machine speaks for itself in comparison with the patents.

The MASTER.—It will be received.

(Whereupon, at four o'clock P. M., the parties proceeded to the plant of the Angelus Sanitary Can Machine Company, No. 4900 Pacific Boulevard, Los Angeles, where (the following being present: The Special Master; Raymond Ives Blakeslee, Esq., counsel for plaintiffs; Charles C. Townsend, Esq., counsel for defendants; Mr. R. S. Berry, plaintiffs' expert; Mr. J. M. Abbett, defendants' expert; Mr. R. V. Augensen, demonstrator and machinist of the Angelus Sanitary Can Machine Company, and the Reporter) the following proceedings were had:

An examination and discussion by parties above noted as present was had of a machine of defendants'.

Mr. BLAKESLEE.—The machine is offered in evidence as Plaintiffs' Exhibit 5, to remain constructively in the custody of the Master and to remain in condition as at the present time, subject to the order of the Master or the Court.

[117] 514 Post Office Building.

Los Angeles, California, Thursday, January 4, 1923,
10:00 A. M.

The MASTER.—Do counsel desire a statement from the Master as to the mechanism reviewed by him at the plants of the plaintiff and the defendant?

Mr. TOWNSEND.—Are the remarks you are about to make based upon notes you made at the time, or are you just speaking of your recollection of events?

The MASTER.—Partly from notes made at the time, and partly from my recollection of events.

Mr. TOWNSEND.—I was wondering if you made a memorandum at the time.

The MASTER.—I did on the following day.

Mr. BLAKESLEE.—We feel that the machines speak for themselves, plaintiffs' machine having been offered, and the defendants' machine likewise offered in evidence. As to the latter machine it has been suggested that the offer be withdrawn and that a re-offer be made after a further visit to defendants' plant, which we understand will be subsequent to a going over of the machine to put it in perfect running order and condition. Of course we welcome any statement the Master may wish to make as to these machines, especially if memoranda were made at the time to support such statement; [118] but we do not suppose that the Master will attempt to state all his recollections or that the record of such recollections made by

such statement will be deemed to be all that the Master saw or all that the Master thought, and if that be the situation we believe that remarks by the Master as to his observations may well be made of record.

The MASTER.—The only purpose of making the suggestion was in order that counsel could see to what extent the Master understood the mechanism. It might well be that there will be some glaring error which would carry on through the case until the very end, whereas if you were aware of the error you could correct it at once.

Mr. TOWNSEND.—That, I appreciate, of course, is a very commendable purpose of your making a statement at all at this time. As I understood, the purpose of the rather unusual procedure of our starting to view the machines before any evidence was taken was that it was simply in the nature of an opening statement, as it were, so that the Master might perhaps understand the issues more clearly in his own mind. I do not suppose the Master would take to himself the expert knowledge of an experienced man in this art, but you naturally wanted to see what these machines that we were going to talk about so much looked like, and in recording your observations at this time I do not presume it will be accepted as evidence but merely as a clarification of your views and addition to your own knowledge on the [119] subject.

The MASTER.—Solely for that purpose.

Mr. BLAKESLEE.—I think the record might well show that my recollection prompts me to state

as a fact—and I wish to be corrected if I am mistaken—

Mr. TOWNSEND.—Now, I do not think it is proper for counsel to offer any suggestions at this time or appear as a witness. We are going to take evidence on these matters.

Mr. BLAKESLEE.—Now, I do not wish to be interrupted. I am not going to refer to structure at all; but I think the record should show the approximate amount of time we spent at those plants, and my recollection is that we spent at least an hour and a half in inspection and discussion of the machine at the plaintiffs' plant, and probably twenty minutes at the defendants' plant. If those figures are not correct, possibly the Master can more accurately state what the time was; but I think the record should show that a considerable time was consumed, particularly at plaintiffs' plant. This practice of visiting plants and inspecting machines is well established in this Court and has been followed by Judge Trippett several times in cases in which I have been counsel, and the obvious purpose, I think, is to familiarize the Court with the things that are being talked about in the case. Now, if the amount of time I have stated is not accurate, I think possibly someone—

The MASTER.—We arrived at the first plant at 2:30 o'clock [120] and adjourned at 4; and I think about twenty minutes is what we spent at the second plant.

Mr. BLAKESLEE.—Yes.

The MASTER.—Now, at the Pacific Closing Machine Company a can-topping and sealing machine was already assembled and attached to a power belt. This commercial device was explained by Mr. Webber, who was, I believe, an employee of Mr. Wilson. It consists of three disks and two turrets. The first disk, as I understand it, is not a part of the patent. Then there is a revoluble disk with a center rubber heel the circumference of which was cut into four segments and was explained to be the timing device for the carrying of the cans on to the second disk, which is a device of the same character as in the first patent introduced, or what might be called the feeding disk. The feeding disk revolves at the same rate of speed as the first disk, and at the center of the feeding disk was a star wheel with four arms. This takes the place of the rubber wheel of the first patent—

Mr. TOWNSEND.—Pardon me, your Honor. That expression may be desirable to the defendant or may be undesirable, but I believe you should—

The MASTER.—I mean it is in the same location as the rubber wheel. I did not mean as a mechanical equivalent.

Mr. TOWNSEND.—I don't think any of us is competent to express that just at this moment, and if your Honor would [121] confine yourself to the physical things and facts I think it would be better—and I say that, of course, in the kindest spirit of suggestion.

The MASTER.—Yes.

Mr. BLAKESLEE.—I understand the statement

is amended to the extent of saying that the star wheel occupies the position in the machine which the rubber wheel does in the patent Exhibit 1. Is that correct?

The MASTER.—That is what I meant. Now, the star wheel seems to perform a double function. And, incidentally, any of the statements I make are not arbitrary at all, but subject to correction by the experts, and I may change my whole view of it after hearing evidence.

Mr. BLAKESLEE.—And subject to such further observation of the machines as the master may deem wise.

The MASTER.—Yes. This double function is: first, if a can is fed too fast on to the feeding disk the outside curve of one of the arms will retard the movement of the can forward; and, second, if one of the cans comes in front of the tip of the rubber wheel it will accelerate its motion so as to have it come in front of the timing device coming up through the slots in the floor of the disk. Now, the timing device moves the can forward to the third disk, and there the can passes under a top feeding device, and as it passes in the passageway, it moves a finger which releases a cam wheel attached to a rod to operate a mechanism to allow a [122] can top to fall over the can. The can top proceeds in grooves above the can until the can is raised on to the stand of the seaming machine proper in one of the turrets. At that point the top comes down and an encircling device begins to seam the can's top edge with the can top circumference. In this first

turret the can revolves one and one-fourth times, and is then passed to a second turret—

Mr. BLAKESLEE.—Allow me to interrupt a moment. Might that be amended—I think Mr. Townsend will agree—to say that the can revolves on its own vertical axis, to distinguish from the revolution which is given with the turret? Isn't that correct?

The MASTER.—That is correct. In the second turret it goes onto a platform which does not revolve on its own axis but is carried around to discharge the can, and while so being moved rollers encircle and iron the seam. The mechanism, considered as a whole—

Mr. TOWNSEND.—If your Honor please, do you not recall that in the second turret the can revolves also, and the seamers are stationary?

The MASTER.—No, I don't observe the can revolving in the second turret.

Mr. TOWNSEND.—The can in plaintiffs' machine spins at all times on both turrets.

The MASTER.—I did not so understand it. The turret was absolutely quiet, as I recollect it; there was no movement [123] of the can whatsoever. But that is a matter we can see hereafter.

Mr. TOWNSEND.—Now let us have that straight, because the plaintiffs can easily correct that if we are in error.

The MASTER.—What does the plaintiff say with respect to that disk? What do you say, Mr. Berry?

Mr. BERRY.—Yes, the can is spun on the second turret.

Mr. BLAKESLEE.—I would suggest that all statements made to the Court be made by counsel, to avoid confusion. Let the experts speak to the Court through counsel.

The MASTER.—Now there is a matter that shows the advantage of this opening statement. I have very clearly in mind that that station on which the can stood simply passed around without any revolution whatsoever.

Mr. TOWNSEND.—The chuck mechanism is continuously revolving in both cases, on both turrets.

The MASTER.—Well, these notes were made the day afterwards.

Mr. TOWNSEND.—Well, I believe plaintiff is willing to concede that.

Mr. BLAKESLEE.—Oh, yes, there is a revolution of the can on its vertical axis in the second turret during the rolling down of the seam.

The MASTER.—Yes. The mechanism considered as a whole, and the general mode of operation, is, first, can-feeding disk with a track of parallel strips for carrying and advancing [124] the can to a second disk or wheel with spaced apertures to receive same and pass it under the can top feeding device. It then goes into a first turret, where the first seaming operation is performed, and from there is passed to the second turret where the ironing of the seam is performed, and is discharged.

Mr. BLAKESLEE.—May I ask if the Court wishes to add to that statement from his recollection the transfer member between the two turrets,

which rotates and passes the cans from the first turret to the second?

The MASTER.—Well, I have a recollection of it, but I couldn't describe it very clearly. Now that is as far as I have any notes. I wish also to add that the two experts and myself, after advising counsel that we were going—but counsel being otherwise engaged did not get the advice—proceeded to the Los Angeles Can Company's place across the street, and there we observed a can top feeding machine of the old type which seemed to more nearly resemble the patent drawings—I don't know just what they call the mechanism, and they had one of these old machines there with a chute which carried the cans down to feed onto the feeding disk. We only spent a few moments there and then proceeded over to the shop where my recollection of the mechanism now is so confused that I would not care to go into it.

Mr. TOWNSEND.—I suggest that you delay comment on the visit to the defendants' plant until we have had a chance to [125] go out again.

The MASTER.—Yes. I say, I couldn't tell you definitely about it at all now, except I have an idea of moving figures, and moving the cans along, revolving at different spots and at different times and so forth.

Mr. TOWNSEND.—Do you recall the distance apart the two plants were located—the plants of plaintiff's and defendant's?

The MASTER.—I would say about seven miles.

Mr. BLAKESLEE.—Of course if counsel wishes

to inspect the machine which the Master has referred to as having seen across the street at the Los Angeles Can Company's plant I think that can probably be arranged so that counsel can see exactly what the Master saw.

The MASTER.—I might suggest that I would like to see that machine that I saw across the street there again. Also we went into the rear of the Los Angeles Can Company's plant in order to get the geographic relationship of the plaintiff's and defendants' plants, Mr. Guenther's old place of business, being located right there in the rear of the Los Angeles Can Company's plant, the office being upstairs in this large, old building that we observed.

Mr. BLAKESLEE.—Which was the building then of the Los Angeles Can Company, as I understand. Was that the impression that you got?

The MASTER.—Yes, I understood it was a part of the present [126] plant, and also that Mr. Wilson had been engaged as an employee of Mr. Guenther for two and a half years at the old plant.

Mr. BLAKESLEE.—I will ask Mr. Ray O. Wilson to take the stand.

TESTIMONY OF RAY O. WILSON, FOR PLAINTIFFS.

RAY O. WILSON, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BLAKESLEE.)

Q. Your name is Ray O. Wilson? A. Yes, sir.

(Testimony of Ray O. Wilson.)

Q. You are the Ray O. Wilson who is the plaintiff in the present suit? A. Yes, sir.

Q. And you reside at Los Angeles?

A. Yes, sir.

Q. And what is your present business or occupation?

A. Manager of the Pacific Closing Machine Company.

Q. What is the general business of that Company?

A. Building closing machines, of the type of the Pacific machine, large and small.

Q. Those machines you refer to as closing machines, what is their function?

[127] A. Putting the tops and bottoms on tin cans—sanitary cans.

Q. And you sell those machines to the trade?

A. Yes, sir.

Q. You are one of the parties mentioned, are you, of the parties in suit, Plaintiff's Exhibits 1, 2, and 3, as being one of the patentees of those patents?

A. Yes, sir.

Q. Do you know of your own knowledge whether the parties named on those patents, Exhibits 1, 2, and 3, are still the owners of the interests set forth on the faces of the patents?

Mr. TOWNSEND.—That is objected to as not calling for the best evidence.

Mr. BLAKESLEE.—It calls for yes or no.

The MASTER.—Answer yes or no.

Mr. TOWNSEND.—Exception.

A. Yes.

(Testimony of Ray O. Wilson.)

Q. (By Mr. BLAKESLEE.) Do you know?

[128] A. Yes.

Q. Please state whether or not the persons named on the faces of said patents, Exhibits 1, 2, and 3, are still the owners of the interests expressed on those patents?

Mr. TOWNSEND.—Same objection. It doesn't call for the best evidence, but the expression of a legal opinion.

The MASTER.—The objection is sustained.

Q. (By Mr. BLAKESLEE.) Do you know whether any transfer of any such interest or part thereof has been made by any of the parties named on those patents as patentees?

A. There have been assignments made to Mr. Stetson at the time that the patents were applied for.

Q. Have any assignments been made, to your knowledge, since the issuance of the patents?

A. No.

Q. (By the MASTER.) Are these parties all alive? A. Yes.

Q. (By Mr. BLAKESLEE.) I hand you a paper purporting to be an agreement entered into on the 20th of December, 1919, by and between—

Mr. TOWNSEND.—Just a moment. Don't try to construe the paper.

The MASTER.—He is simply trying to identify it.

Mr. BLAKESLEE.—Yes.

(Testimony of Ray O. Wilson.)

Q. (Continuing.) —By and between Franklin F. Stetson, Arthur D. Sumner, and Ray O. Wilson, parties of the first [129] part, and E. W. Bliss Company, party of the second part, and bearing those names among the signatures, and ask you if the name Ray O. Wilson appearing among the signatures is your name (handing document to witness).

A. Yes, sir.

Q. Did you execute that agreement?

A. I was instrumental in doing so. I made a trip back East—

Q. No, but did you sign that agreement?

A. Yes.

Q. On the day mentioned? A. Yes.

Q. Please tell us who the E. W. Bliss Company is.

Mr. TOWNSEND.—That is objected to as irrelevant and immaterial. The paper must be the best evidence of its own contents.

A. It is a corporation in New York. A corporation located in Brooklyn, building canning machinery and all kinds of large presses, and at one time, torpedo manufacturers for the Government.

Q. (By Mr. BLAKESLEE.) Have you relations at the present time with E. W. Bliss Company?

A. Yes, sir, through that contract.

Q. What is the nature of those relations?

A. A royalty agreement for the eastern territory, around Michigan—

[130] Q. And they pay you royalties to-day?

(Testimony of Ray O. Wilson.)

Mr. TOWNSEND.—That is objected to as irrelevant and immaterial.

A. Yes, sir.

Mr. BLAKESLEE.—Showing the adoption of the invention.

The MASTER.—You haven't shown what the royalty agreement is for yet.

Mr. BLAKESLEE.—Well, the agreement specifies that, and I don't want to put an interpretation on the agreement.

Mr. TOWNSEND.—Is this agreement counsel asks you about still in force, or is it some other royalty agreement that you speak of?

Mr. BLAKESLEE.—I will get to that.

Q. Is this the only agreement in effect between you and the other parties who signed the agreement last handed you and the E. W. Bliss Company, to your knowledge?

A. There is a separate agreement made on the payment of the royalties to Mr. Stetson for some foreign countries, and an agreement between Sumner and I as to royalty for some foreign countries, other than the United States.

Mr. TOWNSEND.—Unless the agreement is produced, your Honor, I move that the testimony go out.

The MASTER.—It will be received subject to its production.

The WITNESS.—That is a supplemental agreement, though, to the main one. That (other document) is the main one.

(Testimony of Ray O. Wilson.)

[131] Q. (By Mr. BLAKESLEE.) Is this agreement which you have just identified as to the signatures still in force and effect as to all parties?

A. It is.

Q. And are you and the other parties of the first part receiving royalty payments from the E. W. Bliss Company pursuant to that agreement?

A. We are.

Q. How long have you been receiving those royalties?

A. Approximately—the first royalty was paid in October, 1920. Around there. It may be later. It may have been in January.

Q. Have the royalties provided for in such agreement been regularly paid to the parties of the first part? A. Yes.

Q. Is that concern, E. W. Bliss Company, a large or small concern, if you know?

Mr. TOWNSEND.—That is objected to as irrelevant and immaterial.

Mr. BLAKESLEE.—It is to show the extent of the adoption of the invention.

The MASTER.—The objection is overruled.

A. It is a large concern.

Q. (By Mr. BLAKESLEE.) Have you visited its plant? A. Yes.

Mr. BLAKESLEE.—We offer in evidence the agreement just [132] identified and referred to by the witness as Plaintiff's Exhibit 6.

Mr. TOWNSEND.—It is objected to as incompetent, irrelevant and immaterial.

(Testimony of Ray O. Wilson.)

Mr. BLAKESLEE.—My purpose is to show the adoption of the invention, and the agreement refers to the patents in suit, on its face, and the license therein given as expressed on the face of the agreement refers to those inventions of the patent in suit. It is for the purpose of showing the adoption and commercial use of the invention.

The MASTER.—It will be received. The objection is overruled.

Mr. TOWNSEND.—Exception.

Q. (By Mr. BLAKESLEE.) To what extent, to your knowledge, have can closing machines made by your Company or your licensee, E. W. Bliss Company, been placed in the canning industry?

Mr. TOWNSEND.—Now, if books are kept they will show this information accurately, your Honor, and that would be the best evidence, unless this gentleman can show that he has taken the figures he is going to refer to off the books and knows about their authenticity.

Q. (By the MASTER.) Do you know the general extent, Mr. Wilson?

A. Why, it is somewhere around—

Q. Do you know it yourself?

A. No. We know as to the machines we have built, and we [133] can't tell exactly the number of machines made by the E. W. Bliss Company because we haven't the last date.

[134] Q. (By Mr. BLAKESLEE.) Confine yourself to your own knowledge, Mr. Wilson, and tell us where and to what extent these machines:

(Testimony of Ray O. Wilson.)

have been placed, as far as you know, by either your company or the E. W. Bliss Company.

A. Well, of course it will not be an accurate statement at all, but I know of seven machines that went to Italy, and five or six have gone to Great Britain, one or two to France, approximately thirty-five or forty around the district of Baltimore,—and of course they would be sent out by the can factories to outlying districts, and—

Mr. TOWNSEND.—That is hearsay.

A. (Continuing.) —and several around New York City. Around here we have 104 machines have been built, and approximately 80 of them are out giving service; 23 in the Hawaiian Islands, one in New Zealand, eight of them in Alaska, and the majority of the rest of them are around in Southern California.

Q. (By Mr. BLAKESLEE.) Were you present at the shop of the Pacific Closing Machine Company on the 22d of December last year—namely, last month—when the Special Master and counsel and others visited that shop and examined a machine there? A. Yes.

Q. Do you know which machine was examined by the Special Master and counsel and others mentioned? A. Yes.

[135] Q. Are you familiar with the construction of that machine? A. Yes.

Q. Can you state whether or not the construction of that machine agrees, in the main, with the

(Testimony of Ray O. Wilson.)

machines which have been put out to the canning industry in accordance with your recent testimony?

Mr. TOWNSEND.—That is objected to as calling for a conclusion of the witness.

Mr. BLAKESLEE.—I am simply trying to show the machines the plaintiffs have put out.

The MASTER.—It is a general question, and I think it may be answered.

A. It does.

Q. (By Mr. BLAKESLEE.) Of the same general type? A. Of the same general type.

Mr. TOWNSEND.—That is open to the same objection, your Honor.

The MASTER.—You can interrogate him on cross-examination about that.

By the way, it just comes to my mind about that second turret spinning. I do remember now that it was spinning. It was the defendants' commercial machine; he had the stationary first turret, and I confused them in my recollection in the statement I made.

[136] Q. (By Mr. BLAKESLEE.) I hand you a number of publications and ask you to refer to same and state in regard to each one, whether, to your knowledge, it is an issue of a publication generally distributed in the canning trade and of which you received a copy in accordance with such general distribution; and in connection with each one, where you can so state, refer to any matter by page or mark which refers to the distribution and the use of canning machines such as you have tes-

(Testimony of Ray O. Wilson.)

tified to, to wit, those placed with the canning trade and industry by your company and the E. W. Bliss Company.

Mr. TOWNSEND.—In the first place, that question is not only multifarious, but it is leading in several respects. More than that, this is an attempt to foist hearsay testimony on the Court by referring to self-serving advertisements.

[137] Q. (By Mr. BLAKESLEE.) Please identify these publications if you can, to wit, that they were publications which, to your knowledge, were distributed publicly, and then point out in each any printed matter referring to the machines of the plaintiff or E. W. Bliss Company.

Mr. TOWNSEND.—Now, that is again leading. Why not ask “What steps has your company taken to advertise your machine, [138] and have you the advertising matter before you? If so refer to the page and number.”

The MASTER.—Well, answer Mr. Townsend’s question.

Mr. BLAKESLEE.—I accept the question as stated.

The WITNESS.—Do you want the ones out—the date and the magazine?

The MASTER.—Yes. What have you there?

A. This is “Canning Age” of February, 1922. We take this magazine. It is a regular magazine gotten out in New York City.

Q. (By Mr. BLAKESLEE.) Now, what is the page?

(Testimony of Ray O. Wilson.)

A. Page 47 is the beginning of E. W. Bliss' advertisement, and they end up on page 50, the last of their advertisement, showing a battery of Bliss 81 Double Seamers in the cannery of the Hawaiian Pineapple Company of Honolulu.

Mr. TOWNSEND.—Now, that is not an answer to the question in the first place. And, in as much as he did not put in that ad himself, let the Bliss Company have somebody here to testify to what their advertisement was.

The MASTER.—Well, it is some advertisement in a trade paper and will be taken for what it is worth.

Mr TOWNSEND. — What comes under his knowledge is another thing.

He can say portrays plaintiff's machine, whether made by the company plaintiff or whether by its licensee.

A. (Continuing.) This advertisement covers 18 machines out [139] there in a line, of which only 6 of them were built by the E. W. Bliss Company.

Mr. TOWNSEND.—Now, I object to that as hearsay. The document itself is the best evidence of its contents, but it is not admissible, as hearsay.

The WITNESS.—I have seen these machines myself.

Q. (By the MASTER.) Now, what have you there?

A. A trade paper; and on page 73 is an advertisement of the Southern Can Company headed

(Testimony of Ray O. Wilson.)

“Noteworthy Double Seamer Development.” It just goes through and explains—

Q. (By Mr. TOWNSEND.) Now, is that an advertisement of your company?

A. The Southern Can Company of Baltimore.

Q. (By Mr. BLAKESLEE.) Is it a machine furnished by you?

A. It is a machine furnished by the E. W. Bliss Company to them.

Mr. TOWNSEND.—I object to it as hearsay.

Mr. BLAKESLEE.—Our purpose is to show that that—the issue has been raised directly in the answer that this machine is not an invention, and so forth, and is not of value, and so forth.

The MASTER.—Are you offering to show utility and invention?

Mr. BLAKESLEE.—To show utility, value, and adoption of the invention, and the distribution of it to the trade, taken in conjunction with other testimony as to the number [140] of machines he has placed in various parts of the industry.

Q. Now leave out any advertisement which you do not know is an advertisement of the machine of the Pacific Closing Machine Company or the E. W. Bliss Company and then answer accordingly. Refer to the date of each magazine as you go along.

Mr. BLAKESLEE.—I will offer all these in a group.

[141] A. Sometimes the Bliss Company carry our advertisements, and sometimes they don't carry an advertisement of our machines. They have a

(Testimony of Ray O. Wilson.)

large variety of canning machine equipment and they carry a series of advertisements. This is August, 1922, "Canning Age."

Q. Now, is that a magazine of which you have received copies?

A. It is. On page 55 is our advertisement, of the Pacific Closing Machine Company. Now, in February, 1922, in "Canning Age," page 9. This is the magazine I referred to a while ago. On page 89 is our advertisement, Pacific Closing Machine Company.

Q. Is that a magazine which has been generally distributed to the trade to your knowledge?

A. It is.

Mr. BLAKESLEE.—The two magazines just identified and discussed by the witness, to wit, "Canning Age" of August, 1922, and February, 1922, are offered in evidence, respectively, as Plaintiffs' Exhibits 7 and 8, the offer being confined to the matters pointed out and designated by the witness. The August issue is Exhibit 7 and the February issue is Exhibit 8.

Mr. TOWNSEND.—Said exhibits are objected to as incompetent, irrelevant, and immaterial, self-serving, and hearsay.

The MASTER.—The objection is overruled.

Q. (By Mr. BLAKESLEE.) Have you taken steps to circularize [142] the canning industry or put before the canning industry printed matter concerning the structure and purposes of can closing

(Testimony of Ray O. Wilson.)

machines manufactured by the Pacific Closing Machine Company? A. We have.

Q. Can you produce any such printed matter?

Mr. BLAKESLEE.—Witness produces three catalogs.

A. This is really only one catalog as an advertising medium. This (the other) is an instruction book to take care of the machine after it has been installed, for the benefit of the operator. And these are the same.

Q. What, then, are these two remaining catalogs or books, one of which is labeled “Type B Model 21” and the other of which is labeled “Instruction Book and Catalog of Parts for Type B Model 21”?

A. One is used as an advertising medium, and the other is used to take care of the machine after it is installed, to help the operator out.

Q. To what extent have you distributed or circulated these books to the canning industry?

Mr. TOWNSEND.—This whole testimony is objected to as incompetent, irrelevant and immaterial.

A. About 400 have been distributed.

Q. (By Mr. BLAKESLEE.) 400 of which?

A. 400 of the advertising catalog.

Q. And how many of the instruction book?

[143] A. One goes out with each machine.

Q. And that is true of the machines which you have testified to as having been sold, that is, the Pacific Closing Machine Company? A. Yes.

Mr. BLAKESLEE.— We offer these books in

(Testimony of Ray O. Wilson.)

evidence, the catalog as Plaintiffs' Exhibit 9 and the Instruction Book as Plaintiffs' Exhibit 10.

Mr. TOWNSEND.—They are objected to as incompetent, irrelevant and immaterial.

The MASTER.—The objection is overruled.

[144] Mr. TOWNSEND.—I haven't raised the objection before because I didn't want to anticipate counsel, but I think in connection with all this examination it ought to be shown what connection there is between the Pacific Closing Machine Company and the plaintiffs here.

The MASTER.—He said he was General Manager of the Pacific Closing Machine Company.

Mr. BLAKESLEE.—Yes.

Mr. TOWNSEND.—But what connection has the Pacific Closing Machine Company with the L. A. Can Company? The Pacific Closing Machine Company is not a party to this suit.

Mr. BLAKESLEE.—He is manager of it and making these machines, making the machines that the Master inspected. I will connect that up.

Mr. TOWNSEND.—That doesn't reach the objection I raised.

Mr. BLAKESLEE.—But I don't want to put a question that calls for a conclusion as to whether the plaintiff is making the patented machine.

Mr. TOWNSEND.—But what has the Pacific Closing Machine Company got to do with the L. A. Can Company or Mr. Sumner or Mr. Stetson?

Mr. BLAKESLEE.—He has testified what it has to do with him. He is manager of it and he is

(Testimony of Ray O. Wilson.)

plaintiff, but I will ask him about it: What connection, if any, has Mr. Arthur D. Sumner, one of the plaintiffs in this case, with the Pacific Closing Machine Company?

[145] A. He is one of the directors and stockholders.

Q. Does he take an active part in the management or conduct of the business? A. No.

Q. What connection, if any, has Mr. Franklin F. Stetson, a plaintiff, with the Pacific Closing Machine Company?

A. He is the president and the largest stockholder.

Q. Does he take any active part in the direction of the business? A. He does.

Q. You and he together direct and operate that concern? A. That is it.

Mr. BLAKESLEE.—That will hook it up further.

Mr. TOWNSEND.—But that doesn't show any connection with the L. A. Can Company.

The MASTER.—Let's find that out.

Q. (By Mr. BLAKESLEE.) What, if any, connection exists between the Pacific Closing Machine Company and the L. A. Can Company, one of the plaintiffs in this case?

A. Nothing, only they are our biggest customers.

Q. (By the MASTER.) The L. A. Can Company makes machines, doesn't it? A. No.

Q. (By Mr. BLAKESLEE.) The Can Company makes cans, does it not? A. Yes, sir.

(Testimony of Ray O. Wilson.)

[146] Q. (By the MASTER.) And used your machine? A. That is it.

Q. (By Mr. BLAKESLEE.) Mr. Stetson, one of the plaintiffs, and president of the Pacific Closing Machine Company, is an officer of the L. A. Can Company, is he?

A. He is president of it.

Q. How did you come to meet Mr. Guenther? defendant in this case?

A. Why I can't get the dates just exactly but it was somewhere around 1911 that I first went to work for Mr. Guenther.

Q. How did you come to meet Mr. Guenther?

A. Through Mr. Harrington, the die maker of the Los Angeles Can Company.

Q. What was Mr. Guenther doing then?

A. Manufacturing the double seamer, P-14.

Q. The machine known as P-14? A. Yes, sir.

Q. How many turrets did that machine have?

A. It didn't have what would really be called any turrets. It was a double spindle intermittent motion machine.

Q. Where was he manufacturing those P-14 Machines?

A. In a shop of the L. A. Can Company.

Q. That was located where it is to-day?

A. Yes.

Q. Do you know what arrangement he had with the L. A. Can [147] Company for such manufacture? A. No, I do not.

(Testimony of Ray O. Wilson.)

Q. Other machines were being manufactured in that plant, were they?

A. There was a flanger, a can flanger, and what they called a dope machine.

Q. Were cans being manufactured there then?

A. In the plant of the Can Company.

Q. Of the L. A. Can Company? A. Yes, sir.

Q. Who was president of that company then?

A. I think Mr. Stetson.

Q. He was connected with it at that time, was he? A. Yes, sir.

Q. What was the nature of your services at that time?

A. I was acting in the capacity of lathe hand and milling machine hand and worked on the floor part of the time and run the planer part of the time?

Q. How long did you continue your connection with the L. A. Can Company?

A. I don't know. There was a split between the L. A. Can Company and Mr. Guenther shortly before I left there, a month or so.

Q. Of what year? A. Of 1914.

Q. Then what did Mr. Guenther do, to your knowledge?

[148] A. Went on the same way. I don't know about the organization, though.

Q. How long did he continue, to your knowledge, making machines like P-14 at that plant, the L. A. Can Company?

(Testimony of Ray O. Wilson.)

A. I couldn't tell exactly. It was either 1916 or 1917.

Q. Then what did he do, if you know?

A. Moved across the street.

Q. What was your next move?

A. February 10th I left Guenther and started building the machines covered by our patents.

Q. (By Mr. TOWNSEND.) February 10th when? A. 1914.

Mr. TOWNSEND.—I object to the statement, your Honor, as calling for a legal conclusion, the last part of the statement “covered by our patents.”

Mr. BLAKESLEE.—That may be stricken out, strike out the words “covered by our patents.”

Q. You say you commenced in that year working on can closing machines? A. Yes.

Q. Where did you commence that work?

A. Down at Smith, Booth & Usher's.

Q. In Los Angeles?

A. In Los Angeles on Central Street between Second and Third.

Q. Did Mr. Guenther have anything to do with your work [149] down there? A. No.

Q. Did he have anything to do with any of your work on those machines, or preparing for your work?

A. Yes, he did some planer work for us.

Q. Did he have any suggestions to make as to the construction of those machines or their mode of operation?

(Testimony of Ray O. Wilson.)

A. No. Mr. Guenther never saw the machine until it was finished and was installed in the Stetson Canning Company.

Q. What was the Stetson Can Company, and where was it?

A. A cannery right at the north side of the L. A. Can plant.

Q. On North Broadway?

A. On North Broadway. Well, no. On San Fernando Road.

Q. When was the machine put in there and used?

A. Sometime in August of 1914; August or September of 1914.

Q. Was it used there in closing cans containing food products? A. Yes.

Q. How long was it used?

A. I think approximately a year and then it was repaired and sent out to the V. K. Morgan Canning Company at El Monte, and was used there for one or two seasons, I don't know which.

Q. Did you apply for any patent on that machine? A. Yes.

Q. And what resulted from that application?

[150] A. I don't know the number of the patent but it is the large machine patent there, applied for on August 4th, I think, 1914, and allowed in 1916.

Q. I hand you copies of patents, exhibits 1, 2 and 3, and ask you if it is either of those that you refer to, and which?

(Testimony of Ray O. Wilson.)

Mr. TOWNSEND.—We object to any conclusions that he may draw as to whether or not that so-called 1914 machine is covered by the patent.

Mr. BLAKESLEE.—I didn't ask that. I asked him if he applied for a patent for it, and then what resulted.

Q. Can you pick out the patent?

A. It is patent No. 1,203,295.

Q. (By the MASTER.) Patent No. 3, or Exhibit No. 3? A. Yes.

Mr. BLAKESLEE.—This we call the Master's attention to as Plaintiffs' Exhibit No. 3, or the patent of the file wrapper so numbered as an exhibit.

Q. What steps did you next take regarding these can closing machines?

A. Well, we stopped operations for almost seven or eight months and then we installed some machine tools and a shop on the property of the L. A. Can Company and in that place I think we built 12 machines.

Q. When was that?

A. Approximately eight or nine months after installing of [151] the machines in the Stetson cannery, the first machine.

Q. That would be in 1915? A. Yes.

Mr. TOWNSEND.—That is leading. Let him testify to it.

A. I can't remember all these dates, though.

Q. (By Mr. BLAKESLEE.) When was the Pacific Closing Machine Company started?

(Testimony of Ray O. Wilson.)

A. The Pacific Closing Machine Company was incorporated June 19, 1921, I think.

Mr TOWNSEND.—The Articles of Incorporation would be the best evidence of that.

Mr. BLAKESLEE.—Yes, but I don't think it is very material. I am merely tracing the events.

Q. Between this time and 1914 and 1915, and the events of those years you have referred to, what did you do about these closing machines, if anything? What was the history of them?

A. We started in that little shop of the L. A. Can Company and I think we built 12 or 14 machines in that place, and then we moved across the street into larger quarters, and since then I think we have finished up the total number of approximately 104 or '5 machines.

Q. Do you mean up to the present date?

A. Yes.

Q. And have placed those with canners?

A. Not all of them. Eighty some of the machines are out.

Q. That have been placed with canners?

[152] A. Yes.

Q. And do you know whether they are in use to-day or not? A. Yes.

Mr. TOWNSEND.—That is calling for a conclusion.

Mr. BLAKESLEE.—I asked him if he knew.

Mr. TOWNSEND.—I don't want hearsay.

A. I have seen nearly every machine that has

(Testimony of Ray O. Wilson.)

been sold by the Pacific Closing Machine Company in operation.

Q. (By Mr. BLAKESLEE.) You have been recently to Honolulu, haven't you? A. Yes.

Q. And saw the machine, which you referred to, over there being operated? A. Yes.

Q. (By the MASTER.) Did any of them come back?

A. We have had two machines turned down.

Q. (By Mr. BLAKESLEE.) And what was the reason in each case?

A. One was a peculiar job that the M. J. Brandenstein Company of San Francisco had, a freak coffee can which was a hard job for us, and they didn't give us time enough, and therefore we come to cross roads and took the machine out.

Q. Was that a special job?

A. Yes, a special job.

Q. For what canning purposes have your machines generally been designed?

Mr. TOWNSEND.—What was the other machine that came back?

[153] Q. (By Mr. BLAKESLEE.) Yes, tell us about the other machine.

A. That was the California Packing Corporation of San Francisco.

Q. What was the trouble in that case?

A. I think it was a personal trouble more than it was a machine trouble, because they had their plant completely equipped with the Troyer-Fox and we tried to squeeze our machine in for a try-

(Testimony of Ray O. Wilson.)

out and the result was it didn't get a very favorable reception.

Q. For what general purposes have your closing machines been designed and constructed? For what classes of work?

A. Mostly the canneries, for the packing of fruit and fish.

Q. Do you know of any instances in which your canning machines, and when I refer to them in that way I mean the canning machines you have told us about in your testimony, and those built by the Pacific Closing Machine Company—do you know of any instances in which your machines, or those machines, have replaced other canning machines? A. Yes, quite a few.

Mr. TOWNSEND.—That is objected to as incompetent, irrelevant and immaterial unless we know what the circumstances were.

The MASTER.—He is only asking as to his knowledge, and he has answered that he knows. Now, let us have the next question.

[154] Q. (By Mr. BLAKESLEE.) What do you know as to such replacements, specifying the parties concerned and the instances, and confining it to your knowledge?

Mr. TOWNSEND.—That is objected to as incompetent, irrelevant and immaterial. If they have proven to their satisfaction that they have got a commercial machine, irrespective of whether it is under the patent or not, that ought to be in evidence, but whether it is beyond—

(Testimony of Ray O. Wilson.)

The MASTER.—He can tell whether it displaced others. The objection is overruled.

A. Do you want all machines?

Q. (By Mr. BLAKESLEE.) Any instances you can recollect.

A. We replaced the Max Ams at San Diego with our machine and we have replaced the Angelus in quite a good many places, the 14-P, at Pomona, in the Golden State at Pomona—well, no, at Ontario.

Q. (By the MASTER.) Not at Pomona?

A. No. And the Golden State at Cucamonga.

Q. (By Mr. BLAKESLEE.) California?

A. Yes, California; and the California Growers at Ontario, Hemet and Riverside, California. And we have replaced the Troyer-Fox at Modesto at the California Co-operative Cannery, and we have replaced some Angelus machines, how many I don't know, at the California Co-operative Cannery at San Jose.

Q. (By the MASTER.) Which type?

A. The P-14.

Q. Not any of the P-24?

[155] A. No, although we had a contest at Pomona with the P-24.

Mr. TOWNSEND.—I object to any matter like that. We are talking about replacements, and I object to any self-serving statements like this.

Mr. BLAKESLEE.—He can state if there was anything that tended to a substitution or replacement.

The MASTER.—Well, a contest wouldn't help

(Testimony of Ray O. Wilson.)

us. They were scrapping all the way through, we will assume that.

Q. (By Mr. BLAKESLEE.) In this last instance did a replacement take place?

A. No, I think it was an addition, that our machine was an addition to their regular plant.

Q. And that plant contained a P-24, did it?

A. Yes, sir, for trial. Ours was likewise on trial.

Q. Was yours adopted and used and bought there?

A. It was.

Q. (By Mr. TOWNSEND.) What was the name of that plant?

A. The Golden State Canning Company at Pomona.

Q. (By Mr. BLAKESLEE.) Are all of those points you have so far mentioned in the state of California? A. Yes.

Q. Do you recollect any other places?

A. The Max Ams was replaced with our machine by the E. W. Bliss Company around Baltimore in quite numerous cases.

[156] Q. In Baltimore, Maryland?

A. Yes, and here we replaced all of the machines in the L. A. Can Company with two exceptions, the P-14 with our machines.

Q. (By the MASTER.) Did the E. W. Bliss Company make machines to sell? A. Yes, sir.

Q. Have the E. W. Bliss Company made any for you?

A. They have. We were short once and they filled in on this Hawaiian order.

(Testimony of Ray O. Wilson.)

Q. (By Mr. BLAKESLEE.) Will you state whether the machines manufactured and sold by the E. W. Bliss Company agree in construction with the machines manufactured and sold by your interests and the Pacific Closing Machine Company?

Mr. TOWNSEND.—That, your Honor, is objected to as calling for the opinion of the witness.

Mr. BLAKESLEE.—He has been to both plants.

Mr. TOWNSEND.—But we haven't had a chance to examine him or find out anything about it.

The MASTER.—He asked him are they of the same type. Is that the question?

Mr. BLAKESLEE.—Yes.

Q. What is the answer?

A. They are the same type. There are a few changes in design from the construction standpoint to increase the output.

[157] Q. Did you have anything to do with the commencement of the manufacture of these machines by the E. W. Bliss Company?

A. Yes. I was there for two months at one time and for seven months at another time.

Q. What did you do?

A. Followed the machines through the shop and saw that they were all right. I was more or less in charge of the way the machines were put together.

Q. Did you have anything to do with the making of patterns for that construction? A. No.

Q. Tell us what differences, if any, exist in construction between the machines made by the E. W.

(Testimony of Ray O. Wilson.)

Bliss Company and those made by the Pacific Closing Machine Company?

Mr. TOWNSEND.—I think that examination is entirely irrelevant, your Honor.

Mr. BLAKESLEE.—I want to show they are putting out the same—

The MASTER.—He said he put out the same except in some minor particulars. Now if Mr. Townsend wants to bring it out on cross-examination, well and good.

Mr. BLAKESLEE.—All right. We will withdraw the question.

Q. You are familiar, are you, with the construction and mode of operation of the P-14 can closing machine of Guenther, the defendant?

A. Yes, sir.

[158] Q. How recently did you witness the commercial operation of one of those machines?

A. Last summer several times.

Q. Did you note the number of cans a minute it was closing and discharging? A. No.

Q. Have you at any time? A. Oh, yes.

Q. What was such number?

Mr. TOWNSEND.—That is immaterial unless we know what the circumstances were.

A. I have seen them run as high as 80 cans a minute in the fish cannery. That is the only one place I have seen them running that high.

Q. (By Mr. BLAKESLEE.) Have you ever known it to operate at a higher speed? A. No.

Q. What was the speed of operation of these

(Testimony of Ray O. Wilson.)

machines, or those you and your interests and the Pacific Closing Machine Company have sold, and in that connection I refer to the rate of operation in closing cans containing products.

Mr. TOWNSEND.—Your Honor, this man is presumed to be a manufacturer, and the rate of operation that he is asking for now varies under various conditions, and, until we know the qualifications of this witness to testify to such matters, and the conditions under which he has made observations, we [159] shall object to the statement as being a mere opinion and self-serving. We haven't any objection to having the truth brought out but we want it brought out on this particular point in a regular way.

The MASTER.—He said he had seen all of the can machines installed at various places. Did you see them operate?

A. Yes. At the time I spoke of the Angelus was going 80, and ours was running 138. Both of them were timed by my watch and I counted them.

Q. (By Mr. BLAKESLEE.) Where did that take place? A. At Wilmington.

Q. California? A. Yes, sir, California.

Q. In a fish cannery? A. Yes.

Q. When was that?

A. That was some time in the summer of last year.

Q. Have you observed the operations of the machines built and supplied by the Pacific Closing Machine Company, or your interests, at the various

(Testimony of Ray O. Wilson.)

places you have told us about, at the plants which you have told us about in your previous testimony?

A. Yes.

Q. And what did you note on those occasions as to the rate of operation of your machines in closing cans containing products?

[160] Mr. TOWNSEND.—What kind of products and where did this take place?

Mr. BLAKESLEE.—I asked him what he noted, and counsel can cross-examine.

The MASTER.—Yes. Tell us whether it was tomatoes or beans or soup.

Q. (By Mr. BLAKESLEE.) Yes, tell us all about it.

A. At the Hemet plant they were running apricots and peaches and the speed was 121 or '2, I think.

Q. A minute?

A. A minute. At the Golden State plants all of their machines ran around 60 cans per minute.

Q. What was being handled there?

A. Apricots and peaches. At the Co-operative Canneries in the north the machines were running from 90 up to 128.

Q. And what was being handled?

A. All kinds of fruits, apricots, peaches and berries.

Q. (By Mr. TOWNSEND.) What cannery was that? A. The Co-operative Canneries.

Q. Where?

A. At San Jose and Modesto and Visalia.

(Testimony of Ray O. Wilson.)

Q. (By Mr. BLAKESLEE.) What was the reason, if you know, for the relatively slow rate at the plant last previously referred to, where 60 was the speed?

A. On account of their cookers and exhaust boxes. The rest of the line did not have capacity enough for the [161] machine.

Q. Now proceed with your previous answer.

Q. (By Mr. TOWNSEND.) What kind of machines were making 60 at this Golden State?

A. Our machines.

Q. (By the MASTER.) The same kind of machines? A. Yes, sir.

Q. (By Mr. BLAKESLEE.) Now proceed further with your observations as to the operation of your machines and the rates of same.

A. At San Diego in the fish we ran them 140, I think. At Wilmington in the fish it was 138. In the can plant of the L. A. Can Company we ran them from 135 to 150. In the East they ran them 165 in the can factories.

Q. What did they can in the East?

A. Nothing. Those are factory lines, where it was 165.

Q. Those are machines for putting bottoms on the cans? A. That is right.

Mr. TOWNSEND.—Don't you want to correct your statement so as to avoid any misunderstanding as to the L. A. Can Company? Is the L. A. Can Company where they are running 135 to 150 on filled cans? A. No; empty cans.

(Testimony of Ray O. Wilson.)

Q. (By Mr. BLAKESLEE.) The L. A. Can Company is a can manufacturing concern, isn't it?

A. Yes, sir.

[162] Q. Now proceed with any other or further observations that you have made.

Q. (By the MASTER.) Fish are not very sloppy, are they?

A. No. In the pineapple business in Hawaii they ran them from 80 to 90 cans per minute.

Q. (By the MASTER.) Is that syrup very thin?

A. Yes.

Q. (By Mr. BLAKESLEE.) Canning pineapples is that?

A. Yes. In the fish business in the north, in the salmon business, they run them around 100 to 110, I understand.

Q. (By the MASTER.) You say "you understand."

A. I didn't observe those machines in the north. I never was there.

Q. (By Mr. BLAKESLEE.) What is it that controls or limits the rate of can closing operations in a canning plant?

A. The rest of the equipment, the filler, syruper, exhaust box and the cooker have all got to be of equal capacity to the machine.

Q. And do operations in such equipment account for the variations in the rate of can closing that you have told us about at these various plants?

A. Yes; and the fruit sometimes is slower cooking than others, and they have to slow it down.

(Testimony of Ray O. Wilson.)

Q. At how many plants approximately have you observed the can closing operation of P-14 Angelus machines?

A. Nearly all of those that have our machine to-day, nearly [163] all of them.

Q. That have 14-P machines?

A. Yes, except the Hawaiian people.

Q. The 14-P machines were supplied first, were they? A. Yes.

Q. (By the MASTER.) Let me ask you a question before I forget it: Does it make any difference as to whether the liquid is light or heavy in the speed with which you run the machine?

A. It does, yes.

Q. That is an element that you didn't mention.

A. It does.

Q. (By Mr. BLAKESLEE.) At any of those plants did you ever observe a can closing operation by a 14-P machine at a rate faster than 80 per minute, that you have referred to? A. No.

Q. Do you know whether these defendants are now making and selling the 14-P machine?

A. No.

Mr. TOWNSEND.—This witness has no knowledge of that. He is not employed by the defendant.

Mr. BLAKESLEE.—I asked him if he knew.

Q. Do you know? A. My answer was no.

Q. You do not know? A. No.

[164] Q. Have you seen any installations at any

(Testimony of Ray O. Wilson.)

cannery of 14-P Angelus, or defendants' machines, which you know to be recent installations?

A. No.

Q. When to your knowledge was the last such installation that came under your observation?

Mr. TOWNSEND.—That is objected to as irrelevant and immaterial.

The MASTER.—He wants to show it supplanted 14-P, I suppose.

Mr. TOWNSEND.—But that is not the proper way to show it.

The MASTER.—He asked him when was the last time that he knew. Now for whatever it is worth it may be received.

Q. (By Mr. BLAKESLEE.) What is your answer?

A. Probably three years ago. Maybe not that long. I can't say for sure—at the Ontario plant.

Q. I hand you a paper, or wrapped package, tied up with a string, with some blue sheets protruding through a tear in the corner, and ask you if you know what the package contains, and where it came from? A. It is a set of our blue-prints.

Q. How did it come here, if you know?

A. I was asked to bring it up here.

Q. Where did you find it?

A. That is a copy of a set that we had in our safe.

Q. At the plant on San Fernando Road?

A. Yes, sir.

[165] Q. (By Mr. TOWNSEND.) What plant is that? A. The Pacific Closing Machine.

(Testimony of Ray O. Wilson.)

Q. (By Mr. BLAKESLEE.) When did you take it from the safe? A. This morning.

Q. When was it put in the safe last?

A. December 1, 1920.

Q. Who put it there, if you know?

A. I can't recall, but either myself or the draftsman.

Q. Do you know it was put in there at that time?

A. Yes, sir, I know it was put in there at that time. I recall the day of putting it in there.

Q. And where was it last before it was put in the safe, if you know?

A. We got the set of blue-prints back from Mr. Guenther, and I think it was that same day, or the day before, that we put them in the safe, that is, we got them the day before, or that same day that we wrapped the bundle up, because it was a complete set of blue-prints and we checked them over, and put them in the safe as a precaution.

Mr. TOWNSEND.—Mr. Blakeslee, what is this mystery package you are inquiring about?

Mr. BLAKESLEE.—The package will be opened later and you can inspect what is in it.

Mr. TOWNSEND.—But you are following a line of mystery-making here.

Mr. BLAKESLEE.—There is no mystery in this. I am tracing [166] the history of this thing so there will be no break in it.

The MASTER.—Proceed, Mr. Blakeslee.

Q. (By Mr. BLAKESLEE.) You say these prints in this package came from Mr. Guenther?

(Testimony of Ray O. Wilson.)

A. Yes, sir.

Q. What do you know about that? How did they come?

A. The Can Company had asked Mr. Guenther to bid on building our machine, and they, having the right, came and got the blue-prints and delivered them to Mr. Guenther, sometime in July I think.

Q. Where were you at that time?

A. I was at the plant.

Q. Of the L. A. Can Company?

A. Of the Pacific Closing Machine Company.

Q. When was it that you first knew of or saw a closing machine made by defendant Guenther, or the Angelus Sanitary Can Machine Company, other than the 14-P machine?

A. It seems to me that was in July, or September 4th that we went out to Pomona, that I spoke of before. That is the first time I ever saw the machine.

Q. What year was that? A. 1921.

Q. This package which you have identified as being taken from the safe this morning, has it remained in the safe ever since it was put there, until the time you mentioned?

A. Yes, until this morning.

[167] Q. Please open this package and refer to the blue-prints and tell us what, if anything, you know about the making of those prints, or the tracings from which they were printed?

A. We have all the tracings and the making of the tracings was done by George McManus, a

(Testimony of Ray O. Wilson.)

draftsman we had for a couple of years, prior to July, 1921, or rather September, 1921.

Q. For what company did McManus, the draftsman, work?

A. For the Pacific Closing Machine Company. It was then the Stetson Machine Company.

Q. I understand, then, that the predecessor of the Pacific Closing Machine Company was the Stetson Machine Company? A. That is right.

Q. And when was that formed?

A. The Stetson Machine Company?

Q. Yes.

A. In 1915, I think, but I am not sure.

Mr. TOWNSEND.—The Articles of Incorporation would be the best evidence of that.

A. It was not an incorporation. It was a copartnership.

Mr. TOWNSEND.—Well, the Articles of Copartnership and the writing would be the best evidence.

Mr. BLAKESLEE.—Who were the copartners of that copartnership?

A. Mr. Stetson, Mr. Sumner and myself.

The MASTER—You better make your offer of these prints, and we will adjourn as it is 12 o'clock. Do you want to [168] offer these now?

Mr. BLAKESLEE.—Yes, but may I ask one preliminary question?

The MASTER.—Yes.

Mr. BLAKESLEE.—That business was started under that name shortly after the dozen machines were made, you say, in 1914 or 1915?

(Testimony of Ray O. Wilson.)

A. I can't say as to that. It started out as the Sumner-Wilson Company, a sort of a copartnership, and then at one time there—it must have been 1915—we changed the name to the Stetson Machine Company. It was all a copartnership.

Q. To your knowledge were there any written articles of copartnership of either of those copartnerships? A. No.

Q. How many of those prints are there there?

Mr. TOWNSEND.—I was going to ask him to count them and let us know how many there are. Do you know how many there are there?

A. No, I do not.

[170] Mr. BLAKESLEE.—The prints just discussed by the witness as having been taken from the safe of the Pacific Closing Machine Company in the wrapper bearing date of “12-1-20” with the word “set” underneath, and the numeral “2,” are offered in evidence, together with said wrapper, there being 134 of such prints, I think, in one group, as Plaintiff's Exhibit 11.

Mr. TOWNSEND.—Let me ask you, Mr. Blakeslee, what is the [171] object of this offer? I might be able to agree to it or then be in a better position to make an objection to it.

Mr. BLAKESLEE.—The offer is to lay the foundation for further testimony regarding the use of these prints by the defendant Guenther in connection with the development of the machines charged to infringe.

(Testimony of Ray O. Wilson.)

The MASTER.—In other words, he had them for five months.

Mr. BLAKESLEE.—Yes, anterior to the time when he built his first machine complained of.

Mr. TOWNSEND.—Well, this five months' stuff is purely gratuitous on the part of counsel and we shall resent any intimation of such kind carried by this offer

The MASTER.—We will receive them as the prints that were in Mr. Guenther's hands. Now, what he did with them I [172] suppose may be proved later.

Mr. BLAKESLEE.—That is the proof to date, and we will follow that by other proof.

[173] AFTERNOON SESSION—2 o'clock.

The MASTER.—You may proceed, Gentlemen.

RAY O. WILSON recalled.

Direct Examination (Resumed).

(By Mr. BLAKESLEE.)

Q. Mr. Wilson do you now recollect since your testimony this morning, any other instance of replacement of any can-closing machine by machines of the Pacific Closing Machine Company?

A. Yes there are three more. The American machine was replaced by ours in the Hawaiian Islands. About 23 machines of ours were installed there, probably replacing twice that number of American machines.

Q. What do you mean by American machines?

A. The Johnson; the J. type machine.

(Testimony of Ray O. Wilson.)

Q. Made by what company?

A. The American Can Company.

Q. Any other instances?

A. And the replacement of the Forry machine in the can plant of H. G. Prince & Company; and the 14-P, Guenther's machine, was replaced at the San Fernando Canning Company, San Fernando, California—four or five machines. Then we replaced the Max Ams machine at the V. K. Morgan Canning [174] Company at El Monte, California. That is all I know of positively.

Q. I call to your attention two further bundles of blue-prints, and taking up one of them first, will ask you what you know about it (handing same to witness).

A. It is the same as the smaller one (exhibit 11) only it is a different size blue-print, that is all. It went through the same process.

Q. Did you bring those prints here? A. Yes.

Q. Where did you get them?

A. Out of the safe of the Pacific Closing Machine Company.

Q. To-day? A. This morning, yes.

Q. What do these prints show, to your knowledge?

Mr. TOWNSEND.—The blue-prints are the best evidence of what they show.

Mr. BLAKESLEE.—Yes; strike that out.

Q. When were those prints put in the safe, if you know? A. December 1, 1920.

Q. And where were they previously, if you know?

(Testimony of Ray O. Wilson.)

A. They were brought back from Mr. Guenther's shop on the San Fernando Road.

Q. And do you know how he got them?

A. Mr. Stetson gave them to him.

Q. When?

[175] A. It was around in July or the first part of August, as I recall.

Q. Of what year? A. 1920.

Q. You mean Mr. Guenther, one of the defendants here? A. Yes.

Q. And has this bundle of prints been in that safe since that time? A. Yes.

Q. They were returned and put in the safe of your company at the same time as the 134 prints of Exhibit No. 11? Is that correct? A. Yes.

Q. I hand you these blue-prints and will ask you to count them.

(Witness counts same.)

Q. How many do you find? A. 76.

Mr. BLAKESLEE.—The roll of blue-prints last identified by the witness, consisting of 76 prints, with the wrapper which contained them and which bears the notations "12-1-20," the word "set" and the numeral "3" underscored, is offered in evidence as Plaintiffs' Exhibit 12.

Mr. TOWNSEND.—Same objection as made to Plaintiffs' Exhibit 11.

Q. (By Mr. BLAKESLEE.) I hand you another package of blue-prints [176] and I will ask you what you know about it.

A. They were taken from the safe of the Pacific

(Testimony of Ray O. Wilson.)

Closing Machine Company this morning, and were placed in that safe on December 1, 1920.

Q. Together with the package of prints of Plaintiffs' Exhibits 11 and 12? A. Yes.

Q. And where did you obtain them before they were put in that safe?

A. They were returned to us from the Guenther place by Mr. Stetson.

Q. Do you know how Mr. Guenther got them?

A. Mr. Stetson gave them to him.

Mr. TOWNSEND.—That is all calling for hearsay.

Q. (By Mr. BLAKESLEE.) Have these prints of this last bundle with the wrapper been in the safe since they were first put in there? A. Yes.

Q. Now, please count them.

(Witness counts same.)

A. I find 221.

Mr. BLAKESLEE.—The group of blue-prints just referred to by the witness, together with the wrapper in which they were contained, the latter bearing the notations "12-1-20," the word "set" and the numeral "1" underscored, are offered together as a single exhibit as Plaintiffs' Exhibit 13.

Mr. TOWNSEND.—Same objection as made to Plaintiffs' Exhibits 11 and 12.

The MASTER.—The objection is overruled.

Mr. TOWNSEND.—Exception.

[177] Mr. BLAKESLEE.—I might ask the witness one more question at this time:

(Testimony of Ray O. Wilson.)

Q. Mr. Wilson, referring to these groups of blue-prints, Exhibits 11, 12 and 13, can you state whether the Pacific Closing Machine Company has constructed can closing machines and sold the same, such machines being built in the shop of that company, in accordance with and following the construction and combination of parts of these blue-prints? Do you know that of your own knowledge?

Mr. TOWNSEND.—That is objected to as leading.

The MASTER.—Overruled.

A. Yes.

Q. (By Mr. BLAKESLEE.) That has been done? A. Yes.

Q. Under whose instructions were the tracings made from which these blue-prints of Plaintiffs' Exhibits 11, 12 and 13 were printed?

A. My own.

Q. Did you supervise the making of those tracings? A. Yes.

Q. From what data were such tracings made?

A. Some from former drawings, pencil drawings that we had. Others were new designs that were brought through. First we would make a pencil drawing and then the tracing.

Q. Did you make any of those pencil drawings?

A. The original ones, yes.

[178] Q. Do you recollect when the original tracings were made? A. No, I do not.

Mr. BLAKESLEE.—That is all.

(Testimony of Ray O. Wilson.)

Cross-examination.

(By Mr. TOWNSEND.)

Q. Mr. Wilson, you have produced and offered in evidence through your counsel three packages of blue-prints, in evidence as Exhibits 11, 12 and 13, Exhibit 11 containing, as I understand, 134 separate sheets, Exhibit 12, 76 sheets, and Exhibit 13, 221, making a total of 431 blue-prints. Now, is there any one of these 431 sheets of blue-prints an assembly of your machine, that is, either an elevation or plan showing what the machine would look like when it was set up? A. No.

Q. What are these 431 prints intended to represent?

A. The different parts and duplications of practically the same parts. Where different sized cans exist of course there will be duplications.

Q. In other words, each one of these blue-prints represent a single piece of metal that goes into your machine? A. That is it.

Q. One blue-print would be for a bolt at one place and another for a cam, another for a gear, another for a star wheel, is that correct? [179] A. Yes.

Q. And then for different sizes of cans you have also got different parts for that? A. Yes.

Q. And how many parts enter into one of your machines normally? A. I do not know.

Q. It would be such a number less than 431 as these blue-prints may be duplicated in places, is that right? A. Yes, that is right.

(Testimony of Ray O. Wilson.)

Q. You state that these blue-prints, 431 in number, were given Mr. Guenther some time in the past. Were any other blue-prints illustrating your machine, and I mean the machine of the Pacific Closing Company, ever given Mr. Guenther?

A. No, only for work that he did for us at different times. He did planing work for us, and that is as far as I can remember.

Q. I am only referring now to this particular machine. Of course I know in your dealings there before that on the 14-P and other work that you undoubtedly gave him blue-prints from time to time.

Mr. BLAKESLEE.—The question is limited, of course, to the witness' knowledge?

A. I say that the blue-prints that were given to Mr. Guenther aside from these were for him to do work for us such as planing work. He planed up a set of bed plates for us.

[180] Q. On what machine?

A. Our own machine.

Q. You mean on this double turret machine you are selling? A. Yes.

Q. When did you give him those prints that he did that planing work from?

A. I guess around 1914 or 1915, somewhere around there. I think that he planed No. 2 and No. 3 machine bed plates for us.

Q. You mean the first two or three machines you built he did planing work for you? A. Yes.

Q. How did these blue-prints, Exhibits 11, 12 and 13, come into Mr. Guenther's hands in the first

(Testimony of Ray O. Wilson.)

place? You said Mr. Stetson took them to him. Why did Mr. Stetson take them to Mr. Guenther?

A. I think Mr. Stetson can answer that better than I can. He knows all the ins and outs of that deal and I had nothing to do with that practically, only handing over the blue-prints to Mr. Stetson.

Q. You testified somewhat fully here that Mr. Guenther had been given these blue-prints and you, or your counsel, left the inference that Mr. Guenther made improper use of them. Now, I want to get at the facts of how Mr. Guenther came to have them in his possession in the first place.

Mr. BLAKESLEE.—We object to the argumentative portion of [181] the question and the conclusion stated.

The MASTER.—That is no part of the question. Answer the question so far as you can.

A. Mr. Stetson said that the Can Company wanted to get bids from Mr. Guenther on our machine and he insisted on us allowing Mr. Guenther to have that full set of blue-prints.

Q. Who is "us"?

A. The Pacific Closing Machine Company. He was after me several times before I actually got the prints out for him, to give those prints to Mr. Guenther, and after I got them ready he gave them to Mr. Guenther.

Q. Mr. Stetson asked you, who were connected with the Pacific Closing Company, to let him have these blue-prints? A. Yes, sir.

(Testimony of Ray O. Wilson.)

Q. When did you say the Pacific Closing Company was organized? A. June, 1921.

Q. Why did the L. A. Can Company have Mr. Guenther figure on building these?

A. I don't know. I surmise, though, that a few of them thought they might be able—

Q. I don't want any surmises. Just stick to matters of your own knowledge. You say the L. A. Can Company wanted Mr. Guenther to do that, to bid on these. Did Mr. Guenther bid on them?

A. I don't know whether he did or not.

[182] Q. From your relationship with all of these parties don't you know positively that he didn't bid on them?

A. I do not know personally whether he did offer a bid on them or not.

The MASTER.—You don't know if he did bid on them? A. No.

Q. (By Mr. TOWNSEND.) Do you know why he didn't bid on them? A. No.

Q. How long were these blue-prints in Mr. Guenther's possession?

A. It would be guesswork for me to say.

Q. Well, I don't want guesswork. Do you know the date they were taken to Mr. Guenther?

A. It was either the latter part of July or the first of August, around in there.

Q. And you don't know the date they were taken? A. No.

Q. You don't know the date either when they were taken away from him, do you?

(Testimony of Ray O. Wilson.)

A. That is very near it, the date on those drawings, because I recall getting them back as a complete set of drawings, and, to safeguard our prints, we looked them over first and then stuck them in the safe, and it might have been the day after they came back we stuck them in the safe.

Q. Well, the day after they were given to you?

A. Yes.

[183] Q. You don't know of your own knowledge where they came from, though?

A. No, but I remember asking Mr. Stetson to get them back.

Q. Some time prior to December 1, 1920, these drawings were returned into your possession?

A. Yes.

Q. (By the MASTER.) All you know, Mr. Wilson, is that you turned the blue-prints over to Mr. Stetson and he brought them back four or five months later?

A. That is it. It was within a day or two of when we received the blue-prints that we put them in the safe.

Q. (By Mr. TOWNSEND.) Do you know whether it was the intention to have Mr. Guenther bid on the manufacture of these machines in their entirety or merely to do certain parts represented by these blue-prints, or to do certain work on certain parts? Do you know of your own knowledge?

A. No.

Q. (By the MASTER.) Do these blue-prints cover all the parts?

(Testimony of Ray, O. Wilson.)

A. I think it is a complete set of blue-prints.

Q. (By Mr. TOWNSEND.) You state that these blue-prints, Exhibits 11, 12 and 13, were made from tracings? A. Yes.

Q. Are those tracings in existence? A. Yes.

[184] Q. Who made those tracings?

A. I made some of them myself. George McManus made the biggest part of them. That lettering on the top there is his work which the majority of them have on.

Q. This "No. 102," "No. 130," and so forth?

A. Yes, and Elderken made the rest of them. There are very few of the Elderken's prints in there, though.

Q. Do you know how long before these blue-prints were given out of your possession into Mr. Stetson's, to be given to Mr. Guenther, that the blue-prints were pulled from the tracings?

A. No. I think when Mr. Stetson first spoke to me about giving Guenther a complete set we had two or three sets made, complete sets.

Q. You had two or three sets of these blue-prints made? A. Yes, from our tracings.

Q. Were they made just shortly before that?

A. Yes.

Q. How long before that had the tracings been completed?

A. Oh, just in the course of events. Some of them might have been completed five years, but I can't tell. They gradually grew up.

Q. How long was McManus in your employ?

(Testimony of Ray O. Wilson.)

A. I think approximately two years.

Q. About two years?

A. About two years, yes. Maybe more than that. I can't tell exactly.

[185] Q. When did McManus leave your employ?

A. I think it was right around the 1st of August, 1921.

Q. Now, when you say your employ, what concern are you speaking of?

A. The Pacific Closing Machine Company.

Q. How long had he been in the employ of the Pacific Closing Machine Company when he left?

A. I think it was around two years. Maybe more. I don't know. I can verify that from the books.

Q. Now, Elderken; you mentioned his name.

A. Yes.

Q. When was he working there for the Pacific Closing Machine Company?

A. He came with us in July, 1920, I think; no, he came with us in September, 1920, and he left in August, 1922.

Q. Where is McManus at present?

A. He went with some moving picture concern.

Q. Whereabouts?

A. I don't know. I think it is in Culver City.

Q. Where is Elderken?

A. He is with the Crowell Packing Company on the San Fernando Road.

Q. Did anybody else besides Elderken and Mc-

(Testimony of Ray, O. Wilson.)

Manus and yourself do any work on these blue-prints and the tracings from which the blue-prints were made? A. No.

[186] Q. Can you recognize your own work in any of these blue-prints? What proportion of these 431 prints did you have anything to do with?

A. I don't know. I couldn't tell you that. A very small proportion, I think, of the tracings, because I never considered myself a draftsman good enough to do tracing work. I have done some of it lately, though. It would be on that set you have there, if there is any. Of course he numbered them all up, and he lettered them all up, so that it would be pretty hard for me to dig out the ones I did.

Q. Are you able to dig out any in these three sets that you did yourself?

A. Well, I don't know. As I say, it would be lettered by him, and it would be pretty hard for me to dig them out.

Q. As a matter of fact, wasn't practically every one of those made by one or the other of those gentlemen, McManus or Elderken?

A. McManus made the biggest part of them. Elderken worked on the gallon machine more than anything else. I think McManus went over all of these and lettered them, the ones I made, and touched them up and fixed the tracings over and put them in shape, so that anything I would discover that I had done would be mighty poor evi-

(Testimony of Ray, O. Wilson.)

dence of the fact that I did it. Here is some I did. I did several of those.

Q. In Exhibit 13 you have pointed to "A-263" as a print on which you did some work.

[187] A. Yes.

Q. That is entitled "Cap Slide Bearing Bracket," is it? A. Yes.

Q. And you are not sure that you did this No. A-263? A. No, sir.

Q. But you recall having done some work of that sort?

A. Yes. There are five or six—a good many sizes.

Q. That 263 is simply the cap slide bearing bracket? A. That is right.

Mr. TOWNSEND.—We submit, your Honor, that these blue-prints, as physical papers, have been shown to be in Mr. Guenther's hands at a certain time, for whatever that evidence is worth. The blue-prints themselves as evidence of any machine is not the best evidence. It is shown that the tracings and the original work is in evidence and this gentleman is merely testifying to secondary evidence relating to these blue-prints.

The MASTER.—I understood the only purpose they were introduced for was to show that Mr. Guenther had them.

Mr. BLAKESLEE.—Yes.

Mr. TOWNSEND.—Well, I say, except to show that these things may have been in the physical

(Testimony of Ray O. Wilson.)

possession of Mr. Guenther; but they are not evidence of anything else.

Mr. BLAKESLEE.—For the purpose of showing Mr. Guenther had them, and that like machines, built in accordance with them, were put out by the Pacific Closing Machine Company.

[188] Q. (By Mr. TOWNSEND.) Now, when you got these blue-prints back into your possession what did you do about having them made—any machines that may have been made later? Mr. Guenther didn't make them, I understand.

A. No.

Q. Do I understand, then, that you entered upon manufacturing them yourself?

A. Oh, we were at that time manufacturing them. We just went right on in the same old course.

Q. And who do you mean by "we"?

A. The Pacific Closing Machine Company.

Q. Then I understand that even though the Pacific Closing Machine Company was manufacturing these machines you, or your associates, requested Mr. Guenther to bid on their manufacture also?

A. I think, Mr. Townsend, that the Pacific Closing Machine Company was against asking Mr. Guenther to bid on any of our products. It was the Los Angeles Can Company that wanted that. With their control of the California rights to the machine they had that right of getting the machines built other places.

(Testimony of Ray O. Wilson.)

Q. Just what is the relationship between the Pacific Closing Machine Company and the L. A. Can Company?

A. Mr. Stetson is the president of both places; that is about the only thing.

Q. He is president of the L. A. Can Company and also [189] president of the Pacific Closing Machine Company? A. Yes.

Q. Now, are you manufacturing cans for the Los Angeles Can Company under some contractual arrangement?

A. No. Can machines, you mean?

Q. Can machines, yes.

A. We build all of this type that they use.

Q. (By the MASTER.) What do you mean by that?

A. The high speed double turret machine. In fact it is the only machine they have bought in the last year.

Q. They were using other machines, were they?

A. Yes.

Q. (By Mr. TOWNSEND.) Now, do you want to stand of record that the only relation between the Pacific Closing Machine Company and the Los Angeles Can Company is that Mr. Stetson is president of both companies? You know, yourself, that that relationship extends much further than that; now tell us about it.

A. I don't think it does. I can't see any other connection.

Q. Do you want to stand of record that you

(Testimony of Ray O. Wilson.)

have no written arrangement between the Pacific Closing Machine Company and the Los Angeles Can Company regarding the manufacture of these machines?

A. There is a royalty arrangement, yes, on the proposition. For the reason that the Can Company holds the California right, we pay them a royalty for every machine that is sold [190] out of California; but that is about the extent of it.

Q. You say the Los Angeles Can Company only holds the Los Angeles rights to this machine?

A. The California rights.

Q. I mean the California rights under these patents. A. Yes.

Q. Is that arrangement between the Los Angeles Can Company and the Pacific Closing Machine Company embodied in a written agreement?

A. I think the only place it is in is in our minutes—the minutes of the corporation—the Pacific Closing Machine Company.

Q. Well, your minutes probably show a certain transaction. A. Yes.

Q. But that doesn't create any contract?

A. No, I know. I don't think there was any other agreement.

The MASTER.—The minutes might be evidence of the fact.

Q. (By Mr. TOWNSEND.) Well, does your arrangement with the Pacific Closing Machine Com-

(Testimony of Ray, O. Wilson.)

pany and the Los Angeles Can Company rest merely in parol, that is, by word of mouth?

A. I think so. That is about the extent of it.

Q. Do you know about how long that arrangement will last? A. No.

Q. Will it last more than one year?

A. The life of the patent. They have the patent, on a [191] royalty basis.

Q. Your arrangement lasts for the life of the patent, more than one year, and yet it is not in writing? A. I think that is it.

Q. Now, what is this royalty arrangement you speak about?

A. We pay them a percentage of the selling price of the machine and also the selling price of the repair parts and change parts sold in California.

Q. What do you do when you get machines that you sell outside of California?

A. The patentees of the machine, Mr. Stetson, Mr. Sumner, and I, get the royalty from those.

Q. Get the royalty from whom?

A. The Pacific Closing Machine Company.

Q. What is the amount of that royalty that you get on the machines sold outside of California?

Mr. BLAKESLEE.—That is objected to as immaterial.

Mr. TOWNSEND.—You have a contract in evidence here that shows an arrangement between these same men and the Bliss Company and specifies \$275 for one type and something for another

type. Now, I want to know about the other agreement.

Mr. BLAKESLEE.—That would be cross-examination, but it is immaterial with respect to any financial relations between the patent owners and the Pacific Closing Machine Company, which is not a plaintiff in this suit, as to remuneration for the use by that company of this invention. I can't see [192] that it is material. No measure of damage is attempted to be proved here, and the royalty paid by the E. W. Bliss Company to the patent owners is immaterial as far as these proofs are concerned, and certainly the amount of royalty under an agreement as to which the witness was not questioned is immaterial.

The MASTER.—As to the relations between the parties, I don't see how the amount of this royalty would interest us.

Mr. TOWNSEND.—Well, it will lead up to something else.

Mr. BLAKESLEE.—We object on the ground that it is not a proper line of investigation either. That is a matter as to which silence may be maintained by these plaintiffs at this time. It may become material on accounting, but not on proof of infringement.

Mr. TOWNSEND.—Now, this is a naturally interested witness in this litigation, your Honor. He has not only one contract, that he has told us about, but others that he has not told us about, and I have a right to go into these matters to the fullest

extent, and it will lead to something further as to the relationship between the Pacific Closing Machine Company and the Los Angeles Can Company. I tried to get out of them a while ago what the relationship was, and they have been dodging it, and I want to find out. I want to find out about these relationships, on the question of interest and bias.

Mr. BLAKESLEE.—Of course he is interested in the case. But this specific transaction is not material, and it doesn't [193] sound on cross-examination, and we believe the witness is entitled to maintain secrecy as to that matter, which is purely collateral and immaterial.

The MASTER.—I think the objection is well taken. The objection is sustained.

Mr. TOWNSEND.—Well, I shall take an exception; and under the rule as to examination before a Master I would like to continue the examination and draw out the facts for the reviewing court to pass upon.

The MASTER.—In view of the nature of the objection, it being for the protection of the secrecy which I think they are entitled to as to their business relations, I would not care to receive this evidence even for the purpose of the record at this time. If I could see any materiality in it, or possible materiality, I would allow it to go in, and it may be that later I would change the ruling, but I don't see any materiality to it at the present time, and without instructions from the Court I

would not want to allow the evidence to go in at all. Furthermore, I will say that the Master would assume the greatest bias on the part of this witness. Nothing you could bring out would increase that bias.

Mr. BLAKESLEE.—He is a party to the suit—a plaintiff.

Mr. TOWNSEND.—Well, this matter goes much further, your Honor, and I think as long as the question of royalty and license has been brought up we are entitled, as a mere matter [194] of right, in a trial in open court, to go into this, and I am somewhat embarrassed by your Honor's suggestion about even receiving this evidence under the rules—and which rule I think you are familiar with—the equity rule that permits the laying out of the evidence even over the Master's ruling.

The MASTER.—My practice is ordinarily to receive all evidence unless there is some reason such as has been suggested here of protecting the parties.

Mr. TOWNSEND.—I think it is a perfectly outrageous suggestion to advance that we are prying into their business, since they have brought out a written document in regard to this company.

The MASTER.—Well, they brought it out for one purpose.

Mr. TOWNSEND.—But if it is admissible for one purpose it is admissible for all purposes.

The MASTER.—This particular royalty would not have any particular bearing whatsoever as

(Testimony of Ray O. Wilson.)

compared with the other royalty they have introduced. The two stand on different footings.

Mr. TOWNSEND.—I am not seeking to make comparisons; I am only seeking to get at the facts we are entitled to. They have no right to conceal one form of contract and trot out for their own purposes another form of contract.

The MASTER.—Well, I suggest that you proceed now, and if there is any further showing made later—

[196] Q. (By Mr. TOWNSEND.) Under that arrangement you have with [197] the Pacific Closing Machine Company whereby you and your associates, Sumner and Stetson, receive a royalty on machines sold outside of California by the Pacific Closing Machine Company, is that agreement in writing?

A. No. That also is only in the minutes. I am sure of that.

Q. Some little inside arrangement you have among yourselves? A. That is it.

Q. How long has that agreement been in force?

A. Ever since the incorporation in June, 1921.

Q. By what authority does the Pacific Closing Machine Company sell these machines that they manufacture in the first place?

A. By what authority? I don't quite understand that question.

Q. (By the MASTER.) What right have they to sell them?

A. Just because the patentees are really the main

(Testimony of Ray O. Wilson.)

stockholders of the Pacific Closing Machine Company. Not all, but the main.

Q. (By Mr. TOWNSEND.) Is this agreement with the Pacific Closing Machine Company solely between the Pacific Closing Machine Company and yourself, Stetson, and Sumner?

The MASTER.—What arrangements do you mean?

Mr. TOWNSEND.—By which the Pacific Closing Machine Company is selling machines.

[198] A. Yes. It would necessarily have to be, I guess.

Q. (By Mr. TOWNSEND.) No, that is not an answer to my question. Is this agreement between the Pacific Closing Machine Company on the one side and simply you and Stetson and Sumner on the other side?

A. As far as the royalty arrangement, yes.

Q. No, as far as the manufacturing is concerned.

A. Yes.

Q. Does the L. A. Can Company have anything to do with saying who shall manufacture?

A. They have a right to manufacture the machine themselves or to have it manufactured by other people other than the Pacific Closing Machine Company.

Q. Is that agreement in writing with the L. A. Can Company?

A. No. It doesn't necessarily have to be. They are holders of the California rights to the patent. That contract is in writing. I think Mr. Stetson

(Testimony of Ray O. Wilson.)

can clear that up better than I can, because that was between him and the Los Angeles Can Company.

Q. You say their rights under these three patents that are left in suit— A. Yes.

Q. —that that agreement is in writing?

A. I think it is. I am not certain about that.

Q. Have you got that agreement?

[199] A. No.

Q. Has your counsel got it?

A. I think Mr. Stetson can get it.

Mr. BLAKESLEE.—We object to that as entirely immaterial here.

Mr. TOWNSEND.—I call upon counsel to produce the agreement by which the L. A. Can Company show any interest whatsoever in the three patents in suit.

Mr. BLAKESLEE.—Now, it is immaterial.

Mr. TOWNSEND.—I don't want to argue the question.

[201] Mr. TOWNSEND.—I again call upon counsel and the plaintiffs to produce the agreement that this gentleman says is just between the L. A. Can Company and the patentees, with respect to any of these patents in suit.

Mr. BLAKESLEE.—If we have it you may have it in evidence. I haven't got it. Now that you have made your point I know what you are after, and you are entitled to it as far as I can see.

Q. (By Mr. BLAKESLEE.) Is that agreement in writing that is referred to?

A. I think it is.

(Testimony of Ray O. Wilson.)

Mr. BLAKESLEE.—We will produce it if we can.

[202] Q. Will you produce that, or have your secretary produce that, at the next session, without a subpoena being produced? A. I will.

[203] The MASTER.—So far as the record before us is concerned the L. A. Can Company has no interest in the litigation.

Mr. TOWNSEND.—That is my understanding of it.

Mr. BLAKESLEE.—Excepting as to its relations with the patentees under a royalty agreement, and so forth.

The MASTER.—We have nothing about that agreement in as yet.

Mr. BLAKESLEE.—No. We will produce that agreement.

Q. (By Mr. TOWNSEND.) The rights that you say that you three co-owners of the patents granted the Pacific Closing Company for manufacture, are those rights exclusive?

A. On the Pacific Coast, yes, excluding California.

Q. Excluding California? A. Yes.

Q. Who else has any rights of manufacture in California? A. The Los Angeles Can Company.

Q. They have a right to get their machines anywhere they please?

A. They have a right to contract them out just as they tried to do with Mr. Geunther.

Q. When you say “the Pacific Coast” what territory do [204] these rights cover?

(Testimony of Ray O. Wilson.)

A. The territory west of the Rocky Mountains, on up through Canada, and the Hawaiian Islands and Australia and Alaska, and that portion of the country.

Q. So in all that territory west of the Rocky Mountains, except California, the Pacific Closing Company has the exclusive right of manufacture and sale? A. That is right.

Q. Who owns the controlling interest in the Pacific Closing Company?

Mr. BLAKESLEE.—We object to that as entirely immaterial.

The MASTER.—Overruled.

Mr. BLAKESLEE.—Exception.

Q. (By Mr. TOWNSEND.) Are you a stockholder in the L. A. Can Company? A. No, sir.

Q. Is Mr. Sumner?

A. No, sir, not to my knowledge.

The MASTER.—He said Stetson controlled both of them before, didn't he?

Mr. TOWNSEND.—I think so, but I wanted to make it clear.

Q. The Master's statement is correct, is it not, that Mr. Stetson controlled both the L. A. Can Company and the Pacific Closing Company?

A. I don't know about the L. A. Can Company but I do know about the Pacific Closing Company.

[205] Q. Are any other directors of the L. A. Can Company directors or officers in the Pacific Closing Machine Company?

(Testimony of Ray O. Wilson.)

Mr. BLAKESLEE.—We object to that as immaterial.

A. Not to my knowledge.

Q. (By Mr. TOWNSEND.) Will you state again all the Pacific machines that you know of as ever having been returned to you? You mentioned two, I believe. Will you again mention those companies or concerns, and any others you can think of?

A. I spoke of M. J. Brandenstein and the California Packing Corporation.

Q. Yes, that is according to my recollection. Now can you recall any other Sumner and Wilson or Pacific closing machines that were ever returned?

A. We have had them returned for repairs. You don't mean that, do you?

Q. No. I mean returned because they were unsatisfactory or where you had put them in a plant and they didn't take your machine but took another machine? A. No.

[206] Q. You can't think of a single one?

A. No.

The MASTER.—The full breadth of his question would call for any machines that you put in a contest with the others.

Mr. TOWNSEND.—That is correct.

The MASTER.—I didn't know whether the witness caught that.

A. I think you have in mind machinery sent back to the Wheeling Can Company in 1916, I think it was. That was sent back because it wasn't satisfactory.

(Testimony of Ray O. Wilson.)

Q. (By Mr. TOWNSEND.) There is one you have thought of. Now can you think of any others returned under similar circumstances?

A. No. I just happened to recall that one just then.

Q. How long was that machine there at the Wheeling Can Company?

A. I don't know. It wasn't over three weeks at the most.

Q. The Wheeling Can Company only had your machine there about three weeks, and then sent it back?

A. I think that is all. It was a very short contest, or a very short trial.

Q. Taking up the proper scope of the question, where you may have placed machines to see whether your machine would be taken as against some other competitive machine, have you always invariably placed your machine under those circumstances [207] or have you ever had any sent back and any other machine taken in place of yours?

A. Well, in these two cases, of the Brandenstein Company and the Wheeling Can Company, I don't know what other machine replaced them, but it wasn't really in contest with any other machine. It was on trial by itself alone.

Q. Were there any others in any other place where you put your machine alongside of another concern's machine where your machine was sent back to you and not accepted?

A. No, I can't think of any.

(Testimony of Ray O. Wilson.)

Q. I don't mean a case similar to the Brandenstein case. I am speaking now of where you failed to make a sale where your machine had a trial.

A. No, I can't recall any more than I have told you about.

Q. Now take up this Brandenstein machine. Just what were the circumstances there again, please.

A. They had a peculiar can. They had more tin in their cover and more tin in their flange. It was a new experiment and called for more time than they gave us.

Q. (By the MASTER.) Was this a coffee can?

A. Yes, a coffee can. I can cite you the trouble that Mr. Guenther had and also that Mr. Troyer, of the Troyer-Fox, had, in making their machines stick, and you can check up the time in either case and see we were shy a good month of sufficient time to make good; that we weren't granted the [208] same length of time that they had.

Q. (By Mr. TOWNSEND.) I wasn't asking for excuses. I am asking now as to the working conditions that you had there. That was for vacuum packed coffee, wasn't it?

A. Yes, that is right.

Q. That is where the can is evacuated of the air and then the top sealed down to maintain the coffee in a condition of vacuum?

A. They first seamed it, then vacuumized the coffee, and then soldered a little pinhole in it.

(Testimony of Ray O. Wilson.)

Q. What was the trouble with your machine in handling that work?

A. We didn't make tight enough seams to suit them.

Q. In other words, it wouldn't maintain the vacuum? A. No.

Q. The seam was loose? A. Yes.

Q. Have you ever met with that condition anywhere else? A. No, sir.

Q. Of failing to keep a tight joint by your machine?

A. No, sir. I never had the machine thrown out for that reason.

Q. Going back to your statement about Brandenstein for a moment, what machine were they using, or are they using, at the time you submitted your machine?

A. They were using the Angelus 14-P and Troyer. That is [209] all of the automatics, but they had several hand machines, semi-automatic.

Q. They were packing vacuum-packed coffee on the Angelus 14-P machine?

A. No. They were putting the bottoms on the cans, that is all. They were packing them on the Troyer.

Q. They were packing and sealing the cans for vacuum pack on the Troyer machines?

A. Yes, sir.

Q. You don't know that they have used the 14-P for sealing the top or creating a vacuum?

A. Not that I know of.

(Testimony of Ray O. Wilson.)

Q. It may have been done without your knowledge? A. It may have been done, yes.

Q. This Troyer machine, what sort of a machine is that?

A. It is similar to the 14-P in operation.

Q. Is that the machine that is made by the Seattle-Astoria Iron Works? A. Yes.

Q. You said that one machine was returned from the California Packing Corporation plant in San Francisco. A. Yes.

Q. Do you know which one of their plants there?

A. The Beach and Leavenworth plant No. 1.

Q. What machine did they take in its place?

A. They had their cannery full of Troyer-Fox machines. [210] Their plant was fully equipped, a No. 1 plant, and we got in on an extra line, where they tore out an old Johnson machine and gave us a try out there.

Q. They stuck the Troyer machine that you referred to in and rejected yours?

A. Yes, up until last year when we made quite a hit with them in the Sanger plant.

Q. What other machines have they got in the Sanger plant?

A. At the Sanger plant they only have a Johnson gallon machine. They had an Angelus gallon machine stuck back in the warehouse, but they didn't use it.

Q. And you put in a gallon machine for them?

A. No.

Q. What machine did you put in there at Sanger?

(Testimony of Ray O. Wilson.)

A. Three two-and-a-halves, a two-pound and a one-pound tall.

Q. You say that the Angelus was putting the bottoms on the coffee cans at Brandenstein's?

A. Yes.

Q. Is there anything different in the tightness of the joint between the bottom and the top?

A. I don't think so.

Q. In other words, the bottom has got to hold tight just as well as the top has got to hold tight?

A. Surely.

Q. How long ago was this Brandenstein episode?

[211] A. I think it was the latter part of 1921. I am not sure, though, about that date.

Q. Was the 14-P Angelus already in there, or did they get one at the same time?

A. It had been in there for a year or more.

Q. I understood you testified on direct examination that it was probably three years ago since you had seen a new 14-P machine installed anywhere. Have you any reason to modify that statement as to time?

A. No. Did I say three years or two years?

Q. You said probably three years ago.

A. I don't recall of sticking exactly to three years as the time of seeing it installed. I don't know how long it has been. I had in mind the Golden State at Ontario the last time I saw a new 14-P installed.

Q. And when was that?

A. Probably three years ago. It was when they

(Testimony of Ray O. Wilson.)

first came out with the clincher. That would fix the date.

Q. You are testifying from memory here to matters running back a number of years, and I want to know how you fix this as practically three years ago.

A. Well, I don't know exactly the date.

Q. Was it 1920, 1921, or 1922?

A. It was probably three years ago, or something like that, but I can't fix the date.

[213] Q. (By Mr. TOWNSEND.) On your direct examination you referred to various speeds at various plants that you claimed your Pacific machine operated at, and you mentioned certain factors in your opinion entering into the matter of speed, as to how fast the cooker was working and how fast some other part of the machinery was working. In what way do those various factors affect the operation of your machine?

A. They affect the speed of the machine.

Q. In other words, do I understand if a cooker is running slower than the maximum speed of your machine you have to slow down your machine to that speed?

A. Not necessarily, no, but it would only run the cans through to the capacity of the cooker. If the cooker was going 100 cans per minute, and that is the limit of its cooking [214] capacity, the machine would only run 100 cans a minute.

Q. Where you have got those different instrumentalities that go into the canning and syrup-

(Testimony of Ray O. Wilson.)

ing and filling and cooking, do you vary the speed of your machine with the speed at which the filled cans are coming to you?

A. If that is running regular, for instance, if they are going to establish the speed in apricots at 80 cans a minute, we will set our machine at 85 and it will handle 80 cans a minute without any trouble.

Q. Did you take into consideration all the factors that go into affecting the speed or delivery of cans from your machine, or any can-heading machine? Have you mentioned all the factors that affect the handling of cans in that speed?

A. No. The goods have a great deal to do with it. With liquid goods it will have to be run slower, and with fish, for instance.

Q. The Master called attention to the fact that goods that are more sloppy the liquid materials wouldn't run as fast as with a lighter material.

A. That is right.

Q. Is there any other factor that you have omitted? A. None that I remember of.

Q. How about the size of the cans?

A. That makes no difference.

Q. It makes no difference whether you are operating on a can $2\frac{7}{8}$ inches in diameter or 4 inches in diameter?

[215] A. No. We found a one-pound tall is handled just as good as a three-pound.

Q. Let's speak in terms of diameter so we can understand it.

(Testimony of Ray O. Wilson.)

A. Well, that would be a 3-inch as against a 4 $\frac{1}{4}$. Now, when you get down to small cans we have run them better than a hundred.

Q. On the smaller cans you can run them faster than the big cans, isn't that true?

A. No, not necessarily. The speed of the machine doesn't affect it.

[216] How would you designate it in terms of weight where the can is of 4 inch diameter?

A. I don't know, but what they call the regular 2 $\frac{1}{2}$ is 4 inches in diameter and 4 $\frac{5}{8}$ tall, and the one-pound tall is 3 inches in diameter and 4 $\frac{5}{8}$ tall.

[217] Q. (By Mr. TOWNSEND.) In this advertising matter you have [218] produced the "Canning Age," Plaintiffs' Exhibit 8, issue of February, 1922, I will ask you if you recognize the advertisement of the Angelus Sanitary Can Machine Company, the defendant in this case, on page 78?

A. Yes.

Mr. BLAKESLEE.—We object to that. The catalog speaks for itself, and whether he recognizes it or not makes no difference. If it is in there counsel may offer it as part of that exhibit.

Mr. TOWNSEND.—Whose handwriting is that in pencil at the top of that advertisement?

A. I don't know. I turned this over to Mr. Blakeslee.

Mr. BLAKESLEE.—It may be stipulated that it is my writing.

Mr. TOWNSEND.—What does it say? I can't read it.

(Testimony of Ray O. Wilson.)

Mr. BLAKESLEE.—Without testifying, may I volunteer?

The MASTER.—You may volunteer.

Mr. BLAKESLEE.—It says, “shows difference between new and old defendants’ machines.”

Q. (By Mr. TOWNSEND.) This advertisement on page 78 shows the 14-P you have been talking about?

A. Yes. Of course I never have seen this on the 14-P.

Q. You are speaking of the can body feed?

A. The can feed, yes, sir.

Mr. BLAKESLEE.—We object to that as calling for a conclusion as to whether that shows the exact machine. We don’t think the witness can tell as to that.

[219] A. I never have seen that on there and I never have heard of anybody else that has seen it.

Q. (By Mr. TOWNSEND.) I am not calling for any conclusions or hearsay, but you have been talking about a 14-P and I wanted to identify the 14-P as the machine in that advertisement, the one you have been referring to. A. Yes, sir, that is it.

Q. And the new machine of the defendant is shown in this advertisement as Angelus No. 24-P?

A. Yes.

Mr. BLAKESLEE.—The same objection unless it is understood it is an advertisement shown there.

The MASTER.—That is so understood.

Mr. TOWNSEND.—We will offer this page 78

as part of the previous offer of Exhibit 8 of the plaintiffs.

The MASTER.—There is some printed matter on there that Mr. Blakeslee may contest. I don't know as he will take exception to it, though.

[220] Mr. TOWNSEND.—The Master has called attention to page 31 of the same issue of the "Canning Age," of Plaintiffs' Exhibit 8, to the item headed, "Angelus Sanitary Can Machine Co.," beginning about the middle of the middle column on that page and ending at the top of the third column, that being an advertisement of the defendant. We will offer that in connection with the exhibit itself. Then on page 2 of this issue of the "Canning Age," Exhibit 8, appears an advertisement, "Troyer-Fox Non-Spill Closing Machines Were the Center of Attraction at the Convention." "Seattle-Astoria Iron Works." Is that the Troyer-Fox machine that you have been talking [221] about?

Mr. BLAKESLEE.—We object to that as calling for conclusion. Nobody can make what it is no matter how skilled a mechanic he is.

Mr. TOWNSEND.—Now wait a minute. I object to your coaching this witness.

Mr. BLAKESLEE.—I insist upon my objection that that is an improper question, and no person from such a blurred and minute showing as that could testify.

The MASTER.—I think the witness can best state whether he can testify or not.

(Testimony of Ray O. Wilson.)

Mr. BLAKESLEE.—He asked if that is the machine and I say nobody can tell. It calls for a conclusion. It is not a machine. It is about a 4 by 5 cut.

The MASTER.—It seems to me the question is proper.

A. Those are the two types of machines that I have seen in use.

The MASTER.—In that same article, Mr. Townsend, there is also a statement with respect to plaintiffs' machine and its exhibition.

Mr. BLAKESLEE.—Did your Honor read that?

The MASTER.—Yes.

Mr. BLAKESLEE.—That ought to be offered also, I think.

Mr. TOWNSEND.—I don't want to offer it, but I want this page 2, advertising the Troyer machine, to be deemed a part of the exhibit, and also the cut on page 32 of the Angelus [222] No. 14-P double seam closing machine. That cut I just referred to there represents the defendants' 14-P as far as the seaming machine itself is concerned, minus the can feed, does it?

Mr. BLAKESLEE.—We object to that; it speaks for itself.

The MASTER.—He has already stated it does, before. A. Yes.

Mr. TOWNSEND.—And your Honor has called attention to the item of the E. W. Bliss Company on page 32, but I submit that that is not pertinent here nor proper because the Bliss Company is not a

party to the suit, and we haven't a Bliss machine, and we don't know what it is. I am frank to say I don't know, and I think we are getting too far afield.

The MASTER.—He said the Bliss people were making their machines.

Mr. BLAKESLEE.—We ask that it go in.

Mr. TOWNSEND.—But that is a conclusion we cannot concur in. What the Bliss people may make would be very much like lots of licensees: they make a machine under a license and the first thing you know they might be building an entirely different machine. I think we are on dangerous ground on the question of publicity, anyway.

Mr. BLAKESLEE.—It speaks for itself. It doesn't say the machine is the same as any other, and it may be illuminating in connection with this license. It seems to me it is as material as the other machines which have been referred to, [223] like the Troyer, and so forth.

The MASTER.—The only reason I suggested it was because I had read the article.

Mr. BLAKESLEE.—We suggested he offer it upon the Master's statement that he has read the article, as a part of this exhibit, in connection with the other matters, subject to any objection that may be made.

The MASTER.—It will be received.

Mr. BLAKESLEE.—The article referred to being the article headed, "E. W. Bliss Company, Brooklyn, New York," page 32 of this Exhibit.

(Testimony of Ray O. Wilson.)

Q. (By Mr. TOWNSEND.) On page 63 of this issue is an advertisement of the Max Ams Machine Co. Double seamers, Max Ams double seamers. Is that the Max Ams machine that you speak of that you have displaced in San Diego and other places?

Mr. BLAKESLEE.—The same objection as to the other machines, as calling for a conclusion as to structure.

The MASTER.—So far as he knows he may testify.

[224] A. It closely resembles one of the types; but they build a number of types.

Mr. TOWNSEND.—I offer this page 63 as part of that exhibit 8.

Mr. BLAKESLEE.—We merely object to the offer on the ground of the objection to the questions concerning it.

Q. (By Mr. TOWNSEND.) Now, in this later issue of the "Canning Age" for August, 1922, Plaintiffs' Exhibit 7, on the front cover, is an advertisement of the Max Ams closing machine, sanitary cans. Is that the machine?

A. The same cut as that in Exhibit 8, of February, 1922.

Mr. BLAKESLEE.—Same objection as last noted.

Q. (By Mr. TOWNSEND.) Is this machine still in use—the Max Ams?

A. Well, it has been several years since I have seen them in use.

(Testimony of Ray O. Wilson.)

Q. How recently have you seen a Max Ams machine?

A. I don't believe I have seen one since I came back from the East in 1920.

Q. The Max Ams Company has not gone out of business on account of the Sumner and Wilson machine, has it? A. Oh, no; not yet.

Q. And the Troyer-Fox machine hasn't gone out of business, either, has it? A. No.

Q. They are both being sold in the open market and you [225] are meeting competition with them to-day, are you not?

A. Yes. Not the Max Ams out here.

Q. And the American Can Company, are they putting out a double seamer, too, in your competition with them?

A. Quite a few of them they are putting out that way.

Mr. BLAKESLEE.—It is usual to have a stipulation, to avoid burdening the Master and ourselves, that all rulings of the Master may be deemed excepted to without the necessity of noting the exception each time, so that the record may be complete in that respect as to formal exceptions to the Court on final report. Is that satisfactory?

Mr. TOWNSEND.—That is agreed.

Mr. BLAKESLEE.—And that may apply to all objections heretofore made, and rulings of the Master, as well as to those hereafter to be made?

Mr. TOWNSEND.—Yes.

(Last question read.)

(Testimony of Ray O. Wilson.)

A. Well, no, we are not in competition with them. I couldn't say that. They put them out to their own customers. It is not like the Troyer-Fox on the open market; they are real competition. That is the only real competition we have here.

Mr. TOWNSEND.—Now, this Max Ams ad on the front page of this exhibit 7 may be considered a part of said exhibit; and likewise the Seattle-Astoria Iron Works ad of the Troyer-Fox Non-Spill Sealing Machine, on page 2.

[226] Q. What you said before in regard to exhibit 8 will apply here?

Mr. BLAKESLEE.—Same objection.

A. Yes. I have seen those machines that that is a photograph of there, if that will do you any good.

Q. (By Mr. TOWNSEND.) Those fellows are giving you real competition, are they, the Seattle-Astoria Iron Works, with that Troyer-Fox machine?

A. Yes. Certainly.

Q. Now, this morning when those "Canning Age" issues were offered in evidence you had several other magazines or articles. What were those, that were not offered but were returned to counsel?

Mr. BLAKESLEE.—We object to that as immaterial, whatever other magazines he may have been looking at.

The MASTER.—I don't see the materiality of it.

Mr. TOWNSEND.—All right. Now, in connection with this exhibit 7, "Canning Age," of August, 1922, appears an advertisement of the Angelus Sanitary Can Machine Company, at page 59, of the

(Testimony of Ray O. Wilson.)

Angelus No. 24—P. I will ask that that be considered also in connection with this exhibit 7.

Q. You advertise in the “Western Canner and Packer”?

A. We have, but I don’t think we carry any more advertisements with them now.

Q. I show you an issue of the “Western Canner and Packer” for October, 1922, Vol. 14, No. 6, and call your attention [227] to page 23, advertisement of the Los Angeles Can Company. Do you recognize that advertisement? A. Yes.

Q. And that “Los Angeles Can Co., Los Angeles, Cal.,” that is one of the plaintiffs in this suit?

A. That is a question that seems not to be settled yet.

Q. Well, it has appeared as plaintiff? A. Yes.

Mr. TOWNSEND.—We wish this advertisement to be copied into the record. It reads as follows:

(Testimony of Ray O. Wilson.)

“LOS ANGELES CAN CO.

Los Angeles, Cal.

Manufacturers of

A Full Line of

C A N S

For All Purposes.

Especially Equipped to Furnish

Sanitary Cans

for

Fruit and Tuna.

Customers Furnished With

High Speed Pacific

also

Angelus Closing Machines.”

Q. What Angelus Closing Machines do you know are referred to in that advertisement?

[228] Mr. BLAKESLEE.—We object to that on the ground that no foundation has been laid. The witness has not been qualified as to whether he is responsible for the insertion of the advertisement or that he had anything to do with it.

The MASTER.—I think I can straighten that out. The L. A. Can Company handled some of the Angelus machines.

Mr. TOWNSEND.—Of course any information your Honor may have will be all right, but we would rather have the witness state.

(Testimony of Ray O. Wilson.)

The MASTER.—Well, he doesn't know anything about—

Mr. BLAKESLEE.—That is objected to on the ground that no foundation has been laid. He has not testified that he had anything to do with its authorization or its insertion, or that that ad emanated from the Los Angeles Can Company at all.

The MASTER.—The objection is overruled. I didn't catch the "Do you know."

Q. (By Mr. TOWNSEND.) Now, after counsel has coached you—

Mr. BLAKESLEE.—Now, I object to that. The objection was made in good faith, and is proper.

A. I would guess it is the machines they have on hand of the Angelus type, the 14-P, that have been brought back from other canneries. They have got lots of them.

Mr. TOWNSEND.—I will offer the paper "Western Canner and Packer" of October, 1922, in evidence as Defendants' Exhibit "J," the offer being momentarily restricted to this advertisement [229] of the L. A. Can Company on page 23.

Mr. BLAKESLEE.—We object to it on the ground that no foundation has been laid and the alleged advertisement has not been traced to the L. A. Can Company by any proof whatsoever.

The MASTER.—Technically, perhaps not; but I guess the paper speaks for itself.

Q. (By Mr. TOWNSEND.) Now, on page 28 appears an advertisement of the Angelus Sanitary

(Testimony of Ray O. Wilson.)

Can Machine Company. Do you recognize in those cuts the machine turned out by the defendant?

Mr. BLAKESLEE.—Same objection as previously noted to this line.

The MASTER.—We are beginning to get cumulative evidence here now. The objection is overruled.

Q. (By Mr. TOWNSEND.) I mean as far as the—

A. Just as the picture represents. I recognize these machines, but I never have seen that one (indicating).

Q. You recognize the cut of No. 24-P?

A. Yes.

Q. And the automatic flanger No. 11-F?

A. Yes.

Mr. TOWNSEND.—That appears on page 23 of Defendants' Exhibit "J."

Q. I show you a portion of a page from the "Western Canner and Packer," being the upper half of page 43, but [230] unfortunately I haven't the whole issue here; but you may be able to recognize your own advertisement, and I assume that that issue was probably of March, 1922, but I will stand corrected if you know the issue to be otherwise or if you have the full magazine yourself.

A. You say that is March, 1922?

Q. It has a notation in rubber stamp, "Received Mar. 22," and I am only assuming that that is approximately the time that thing was published. I see a letter here addressed to the Pacific Closing

(Testimony of Ray O. Wilson.)

Machine Company, which is not dated. But do you recognize that as one of your advertisements irrespective of when it was published?

Mr. BLAKESLEE.—I don't care about the fragmentary part. If the witness will testify that he issued an advertisement of that sort and distributed it, if you will ask him that, I won't object on account of its being fragmentary.

A. Yes, I recall that as one of our advertisements. I had forgotten all about it, though.

Q. (By Mr. TOWNSEND.) Do you know about when that was published? A. No, I don't know.

Q. Was it approximately the date on here that appears in the rubber receiving stamp?

A. Well, I couldn't say. I recall getting the letter from Mr. Williams for the advertisement, but that is about the only thing I remember.

[231] Q. You say you got this letter from Williams? A. Yes.

Q. He wrote it at your solicitation? A. Yes.

Q. And is Mr. Williams still with the Los Angeles Can Company? A. Yes.

Q. Is he interested in the Pacific Closing Machine Company? A. No.

Q. Is he a stockholder? A. No.

Q. How much of the stock of the Pacific Closing Machine Company does the Los Angeles Can Company own?

A. Does the Los Angeles Can Company own?

Q. Yes. A. Not a cent that I know of.

(Testimony of Ray O. Wilson.)

Q. Whatever stock is owned in that respect would be by its officers?

A. By Mr. Stetson and one of the boys that work over there—two of the boys that work over there.

Q. Who are they?

A. Mr. Sumner and Mr. Murray.

Q. Is that Mr. A. D. Sumner, the co-patentee with you? A. Yes.

Q. And he works for the L. A. Can Company?

A. Yes.

[232] Q. And is also a stockholder in your company? A. Yes.

Q. Do you know whether he is a stockholder in the Los Angeles Can Company?

A. I think not. I don't know.

Q. Now, who was the other boy who is at the L. A. Can Company and owns stock in the Pacific Closing Machine Company? A. No one that I know of.

Mr. TOWNSEND.—I will ask that this advertisement last referred to be received in evidence as Defendants' Exhibit "K."

[233] 811 Washington Building.

Los Angeles, California, Friday, January 5, 1923,

9:30 A. M.

(Parties met at the office of the Special Master at the above address and proceeded to the plant of the defendants at No. 4900 Pacific Boulevard, unaccompanied by reporter.)

Mr. TOWNSEND.—If your Honor please, on behalf of the defendants I would like those two

machines that were inspected this morning at the defendant's plant, the Angelus 14-P and the Angelus 24-P, formally offered in evidence as Defendants' Exhibits "L" and "M," respectively.

The MASTER.—You only wish to offer them constructively, do you?

Mr. TOWNSEND.—Well, I don't know of any authority for a constructive offer. They remain constructively in the custody of the Master, but they must be formally exhibits and a formal offer made, and that is what I am making now.

[234] Mr. BLAKESLEE.—We understand that this offer with respect to the defendants' machine other than the 14-P machine just offered is now made in substitution for the offer made by the plaintiffs on the 22d of December, 1922.

Mr. TOWNSEND.—That would be the effect of the offer, because at that time the No. 24-P was not in completed shape.

Mr. BLAKESLEE.—Which offer now made supersedes such previous offer by plaintiffs.

The MASTER.—The machines will be received.

Mr. BLAKESLEE.—Now, does the Master wish to have the record show what took place this morning?

The MASTER.—Yes. The Special Master proceeded with Mr. Blakeslee as counsel for plaintiffs and Mr. Townsend as counsel for defendants and the experts of the respective parties, Messrs. Berry and Abbett, to the defendants' plant, and there the machines Angelus 14-P and Angelus 24-P were

inspected by the Master and counsel, explanation thereof being made by Mr. Roy Augensen.

The party arrived at the plant at about ten minutes after ten o'clock A. M. and left at twelve o'clock M.

The machines were attached to power belts which were operated. No. 14-P was operated at the rate of about 60 cans per minute if cans had been fed into same and No. 24-P was operated at the rate of 125 and then attached to a larger pulley and operated at the rate of 210 cans per minute.

Several cans were passed through each of the machines and [235] tops sealed on them, and experiment was made as to a can passed through 24-P and double seamed standing air pressure. The gage operated with full capacity without any leakage at 40 pounds pressure, and then a can which had gone through the first seaming operation was tested, the gage showing something over 15 pounds pressure before it bubbled.

Comparisons were made between the two machines, and also a wooden model which the defendants had had constructed and which was there at the plant. Also various parts of the machines were exhibited separate from the machines themselves.

Mr. TOWNSEND.—I think that is all right.

TESTIMONY OF ROY AUGENSEN, FOR DEFENDANTS.

[239] ROY AUGENSEN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. TOWNSEND.)

Q. Please state your name.

A. Roy Augensen.

Q. Where do you reside, Mr. Augensen?

A. No. 1242 West 50th Street, Los Angeles, California.

Q. By whom are you employed?

A. Mr. Guenther; the Angelus Sanitary Can Machine Company.

Q. In what capacity are you employed?

A. As seamer expert, and outside man on all machinery that he builds.

Q. How long have you been in the employ of the defendants? A. Since March last year.

Q. Prior to that what had been your line of work?

A. Just prior to that I was superintendent of the Bloomington Canning Company, at Bloomington, Illinois, and prior to that with the American Can Company for five years.

Q. How long were you with the Bloomington Company?

A. One season. I just accepted the job to help them out, in other words.

(Testimony of Roy Augensen.)

Q. What was your position with the American Can Company?

A. Road man; traveling. Outside man.

[240] Q. In what line of work?

A. Double seamers. Traveling around to different canneries, all over the United States practically, on these machines he constructed, supervising the installation and improving, and taking care of them in general.

Q. Had you given any other study to the Canning machinery business than the employment features you speak of?

A. Why, I was really brought up with can-making machinery and double seamers and canning.

Q. Explain that a little more fully, if you will.

A. My father was with the American Can Company since they were just a small place on River Street in Chicago. It was then called the Norton Brothers, and was later changed to the American Can Company. But he was with them for thirty years, and he instructed me and taught me all that he knew and everything that came up with him in regard to can making and canning and double seaming. He was with them before sanitary cans ever came out; he was with them when they had only the soldered cans. So through his instructions I was prepared a little bit before going into the game myself.

Q. In regard to this machinery you were selling for the American Can Company, tell us a little more about the nature of that machinery.

(Testimony of Roy Augensen.)

A. We were not selling the machinery; we were selling the cans and leasing the machines, and they have quite a number of different type closing machines or double seamers. They [241] have intermittent machines and they also have rotary machines, and the feed on these machines has been changed from time to time, improving and perfecting.

Q. Do you know whether or not the American Can Company is still selling double seamers?

A. They are renting double seamers. They don't sell them. They are in the canning business and they rent these machines to their customers as an accommodation.

Q. Are those machines restricted in their use to a small territory, or does it extend over a wide territory?

A. Over a wide territory. I know they have a factory in China and they furnish the same machines in China even, so it is all over the world you might say.

Mr. TOWNSEND.—I suppose the Court will take judicial notice of what the American Can Company is, its scope and so forth, without going into the details as to that.

Mr. BLAKESLEE.—We will stipulate the American Can Company is a large corporation with many branches.

Q. (By Mr. TOWNSEND.) What sort of machines are they using in the Bloomington plant?

(Testimony of Roy Augensen.)

A. They are using what they call the Canco double seamer.

Q. That I understand to be the trade name of a double seamer put out by the American Can Company. A. Yes, sir.

Q. What goods were you canning there?

A. We were canning corn.

[242] Q. And how were you effecting the seal?

A. How is that?

Q. (By the MASTER.) How did you make the seal?

A. A double seam, on these Canco closing machines.

Q. (By Mr. TOWNSEND.) What did you have in the way of a seaming medium besides the tin; did you use what they call composition or something else?

A. They used the paper gasket. That is what they use mostly in the east now. They don't use the compound, only on gallon cans and some No. 2½ and No. 3 cans, where the gasket is liable to fall out before it is ever put on the can; and then there is compound used on fruits—berries. In Michigan there is a lot of compound gaskets used. But all of the pea and corn canners are using the paper gasket. Probably there is some that make their own cans that use the compound because there is less equipment used to put the compound gasket in than the paper.

Q. (By the MASTER.) What do you mean by gasket?

(Testimony of Roy Augensen.)

A. There is a compound gasket (showing), that rubber compound. Others have paper in. Just a paper gasket in that depression there.

Q. A washer? A. A washer.

Mr. TOWNSEND.—A paper ring washer that fits in the can flange there, as I understand it.

Mr. BLAKESLEE.—About the same shape as a Mason jar rubber [243] washer.

Mr. TOWNSEND.—Very much the same.

Q. Aside from these Canco seaming machines of the American Can Company are any other double seamers in use to-day on the coast, particularly here in California?

A. Oh, yes, numbers of them, a great many. As a matter of fact all the American Can Company branches all over the world use the same machine, and there is a great number of them used here.

Q. You were present this morning when the Master and counsel for the parties and the experts, Messrs. Berry and Abbett, were present at the defendant's plant and observed the running of the defendant's machines, Angelus 14-P and Angelus 24-P? A. Yes, sir.

Q. And you are the Mr. Roy V. Augensen referred to by the Master as having explained the operation to the Master? A. Yes, sir.

Q. Here are two blue-prints, Mr. Augensen, which are marked respectively Defendant's Exhibit "A" and Defendant's Exhibit "B," and which I will state, for the benefit of counsel and the Master, are two of the blue-prints attached to

(Testimony of Roy Augensen.)

a bill of particulars furnished by defendants in this case, and I merely want this witness to identify the machines shown in those two blue-prints "A" and "B."

A. This print, Exhibit "A," is of a 14-P machine, Exhibit "B" is of the 24-P.

[244] Mr. TOWNSEND.—I want to formally offer these blue-prints as Defendant's Exhibits "A" and "B" in this case.

Mr. BLAKESLEE.—We object merely where there may be variance as between these prints and the blue-prints purported to correspond with the same, attached to the particulars furnished by plaintiffs.

The MASTER.—They will be received, subject to correction if there is any error.

Mr. TOWNSEND.—Yes; if there is any error I want to know it.

Q. I show you five photographs and ask you if you can identify the machine or machines illustrated in those photographs.

A. Yes, sir. This is the 24-P closing machine.

Mr. TOWNSEND.—I will ask that this be offered as Defendant's Exhibit "N-1."

A. That is the one we saw this morning. This also is a photo of our 24-P machine.

Mr. TOWNSEND.—I will ask that this be offered as Defendants' Exhibit "N-2."

A. This also is a different view of the 24-2 machine seen this morning.

(Testimony of Roy Augensen.)

Mr. TOWNSEND.—I will ask that this be offered as Defendants' Exhibit "N-3."

A. And this is one view of a cap feed and of the increased can feed of the 24-P.

Mr. TOWNSEND.—This I ask to be offered as Defendants' Exhibit [245] "N-4."

A. And this is a different view of the same.

Mr. TOWNSEND.—This is a plan view of "N-4," is it not? A. Yes, sir.

Mr. TOWNSEND.—I offer this as Defendants' Exhibit "N-5."

Q. I understand that Exhibits "N-1," "N-2," and "N-3" are all photographs of the same machine, and the same 24-P that we saw this morning, are they? A. Yes, sir.

Q. And that was operated out there?

A. Yes, sir.

Q. Have you the device here in court shown in the photographs "N-4" and "N-5"?

A. Yes, sir.

Mr. TOWNSEND.—This device I will ask be received in evidence as Defendants' Exhibit "O," and with the device there is also a loose can and a loose cap, which is to be considered as a part of the exhibit.

Mr. BLAKESLEE.—We are to understand, then, that this device Exhibit "O" is the device that was photographed in "N-4" and "N-5"?

Mr. TOWNSEND.—Yes.

Mr. BLAKESLEE.—And has been used in con-

(Testimony of Roy Augensen.)

nection with the 24-P machine shown in Exhibits "N-1," "N-2," and "N-3"?

Mr. TOWNSEND.—It is identical with it. We haven't dismantled the one in evidence.

[246] The MASTER.—This Exhibit "O" we saw this morning is a separate device, isn't it?

Mr. TOWNSEND.—Yes.

Mr. BLAKESLEE.—Ask him if it is identical with it.

Q. (By Mr. TOWNSEND.) How does this Exhibit "O" just referred to, and represented in the photographs "N-4" and "N-5," compare with the corresponding devices we observed in the 24-P operating and represented by Exhibits "N-1," "N-2," and "N-3"?

A. Identically the same.

The MASTER.—Exhibits "N-1," 2, 3, 4, and 5, and Exhibit "O" will be received.

Mr. TOWNSEND.—May I suggest this:

Q. Your answer would be qualified to the extent that in Exhibit "O" only one carrying arm is shown, whereas there would in the actual operation be five arms?

A. Yes, sir. The one was just put on there to show it.

Q. (By the MASTER.) Are there five arms in the machine? A. Five arms.

The MASTER.—The plaintiffs' machine has four.

Q. (By Mr. TOWNSEND.) I show you a folder, or two-leafed circular of the Angelus double seamer

(Testimony of Roy Augensen.)

No. 14-P and ask you if you recognize that circular as a publication put out by the defendants?

A. Yes, sir.

Q. And do you recognize the machine inside of the cover and on the second page?

[247] A. Yes, sir.

Q. Marked "Patented, Angelus Double Seam Closing Machine." A. Yes, sir.

Q. (By Mr. BLAKESLEE.) Were these photographs "N-1" to "N-5," inclusive, taken under your direction and supervision? A. Yes, sir.

Q. You were present at the time? A. Yes, sir.

Q. And to your own knowledge do they correctly and accurately represent the things shown in them?

A. Yes, sir.

Q. (By Mr. TOWNSEND.) Does this cut of the Angelus 14-P, of this circular Exhibit "C," which circular, by the way, your Honor, I offer at this time as defendants' exhibit—correctly represent the 14-P machine as you know it, and, if not, in what particular does it differ, if at all?

A. This cut on page 2 does represent it with the exception of this feed disk which I have never seen used only experimentally at one time.

Q. Do you know whether this cut that you have referred to is the same cut that appeared in those advertisements, and concerning which that disk feature Mr. Wilson himself said he had never seen?

A. Yes, sir.

Q. This is the same cut that is used in the advertisements, apparently.

(Testimony of Roy Augensen.)

[248] A. Yes, sir.

Q. Aside from this feed disk element, the other part of the machine I understand to truly represent the 14-P as you know it?

A. Identically.

Mr. BLAKESLEE.—By “feed disk” I presume you mean the rotating disk and the parts that attend it and support it, and other attachments?

Mr. TOWNSEND.—That support it on the pedestal at the extreme right of the cut.

Mr. BLAKESLEE.—A means for driving the disk, and so forth.

The WITNESS.—I don't know. It is just the disk proper that I see. We still use the same stand only the distance here is shorter now, of course.

Q. (By Mr. TOWNSEND.) Just put a circle with this pencil around the part that is different from the commercial machine. What kind of a feed do you use on this 14-P?

A. The same feed as is used on the 24-P, that is, the feed disk, or this timer. The chain, of course, is not used on that.

Q. By “timer” do you mean a timer for the cans?

A. Yes, sir; to separate cans entering in there.

Q. On page 3 of this same circular, Exhibit “C,” appears a cut which is marked “Cut ‘C’ Automatic Cap Feed.” Have you seen that feed represented in that cut before? A. Yes, sir.

[249] Q. Do you use it? A. Yes, sir.

Q. Where?

A. On the 14-P and also on the 24-P.

(Testimony of Roy Augensen.)

Q. Does the cut shown there appear in the structure of Exhibit "O"? A. Yes, sir.

Q. On the back of this circular, on the fourth page of it, is a perspective entitled "Detailed Cut of Angelus Double Seam Head With Cone on Shaft." Will you state what that refers to, and if you use it, and where?

A. That is a double seam head used on the 14-P and also the 24-P.

Q. Have you here a physical structure corresponding to this cut of the double seaming head?

A. Yes, sir.

Q. How does this device you have just exhibited compare in correctness of detail with the double seaming devices we saw this morning on the two machines? A. Identical.

Q. For how long has such a seaming head been used to your knowledge by the Angelus Company?

A. As long as I have known Angelus machines.

Q. How long is that?

A. It was the first year I went with the American Can Company that I saw Angelus machines, and that was in 1915.

[250] Mr. TOWNSEND.—This device just referred to by the witness is offered as Defendants' Exhibit "P."

The MASTER.—Let me ask: Do they use them this size?

A. No, sir not that size.

That is just an identical model.

The MASTER.—Then this is a smaller size?

(Testimony of Roy Augensen.)

A. It is a smaller scale.

Q. (By Mr. TOWNSEND.) What size of can is this "C" adapted to, or is it just merely a model?

A. It is just merely a model; it cannot be installed on a machine.

Q. It is a little smaller than any that are used?

A. Yes, sir; in proportion.

The MASTER.—Exhibit "P" will be received. You identified this as being used in the 24-P and 14-P machines, didn't you?

Mr. TOWNSEND.—Yes, sir. Is Exhibit "C" received in evidence?

The MASTER.—Exhibit "C" will be received.

Mr. TOWNSEND.—This Exhibit "C" is identical with Exhibit "C" attached to the bill of particulars furnished by the defendants.

The MASTER.—Couldn't it be shown on these blue-prints where the double seamer is?

Mr. TOWNSEND.—Q. At the suggestion of the Master, will you be good enough, Mr. Augensen, to mark on Exhibits "A" and "B" by the words "double seamer" where the same appears, corresponding to Defendants' Exhibit "P"?

[251] A. Yes, sir. (Witness marks.)

Q. I show you another publication of the defendants and ask you if you know what that is?

A. Yes, sir. That is a general catalog printed in Spanish of all types of machines built by the Angelus Sanitary Can Machine Company at the time it was published.

Q. Do you know when that was published?

(Testimony of Roy Augensen.)

A. I think that was in 1918.

Q. That would be before your time, wouldn't it?

A. Yes, sir. I was only reading that from the catalog.

Mr. TOWNSEND.—Well, we will prove publication later.

Q. Is this a publication in general distribution at the present time by the Angelus Company, to your knowledge? A. Yes, sir.

Mr. TOWNSEND.—I will offer this as Defendants' Exhibit "Q," and then prove it up further.

Q. Will you run through this circular Exhibit "Q" and by reference to the pages tell us what the machines are that are there advertised? I ask that not only for brevity's sake but because the language is Spanish here, and we would like to know what the machines are.

The MASTER.—Have you such a catalog in English?

Mr. TOWNSEND.—I don't know whether we have.

The WITNESS.—They are at the printers's now, and being published—that is, new ones. On page 6 there is a cut and description of the Angelus gang slitter.

[252] Q. What do you mean by a "gang slitter"?

A. That machine is used to slit a sheet of tin into certain sized strips for can bodies and for punching.

[253] A. On page 12 there is shown a cut and

(Testimony of Roy Augensen.)

description of the Angelus 14-P machine. On page 14 there is a cut and description of the double seam head used on the 14-P.

The MASTER.—That is Exhibit “P,” is it? That is, the model Exhibit “P”?

A. Yes, sir. On page 15 there is a view showing the second operation, or compression roll mechanism. On page 16 there is a cut of the cap feed used on the 14-P machine. On page 17 it shows a view of the gearing and drive shaft of the 14-P. On page 19 there is a view showing the Angelus 14-P, or 19-P, rather. The 19-P is the gallon size, being identical, only larger in proportion, to the 14-P. Shall I continue on through the book?

The MASTER.—Leave out any that are not 14-P or 24-P, or parts of them.

A. That is all.

A. In the lower right-hand corner of page 23 there is a cut and description of the can tester which was used in our experiment at the Angelus Sanitary Can Company plant this morning in testing those cans.

Q. (By Mr. TOWNSEND.) Is the defendants' product limited to the making of the 24-P's and 14-P machines? A. No, sir.

[254] Q. What other kinds of machinery does the defendant make?

A. It is making all machineries for the manufacture of cans, sanitary tin cans.

Q. Just specify what those are.

A. That would be the slitter, the body maker, the

(Testimony of Roy Augensen.)

flanger, the double seamer and the tester, and also punch presses and curlers, and there is one other machine they make, the cement mixer, or compound mixer, that mixes the compound that is used in those caps.

[255] Q. (By Mr. TOWNSEND.) Taking any of the exhibits that have been referred to here, the blue-prints or the models or the photographs, I wish you would briefly explain what took place this morning in the operation of those machines, and how the 14-P operates, and how the 24-P operates, and make your statement as full as you desire on the record and refer to any of these exhibits that you wish; and if you desire to put in any notations on any of the blue-prints in referring to any of the parts so as to know exactly what you are referring to, you may do so. And I would say your Honor, if there are any points suggested by the witness that you want further light on or that you saw in any different way, don't hesitate to interrupt the witness and have the thing cleared up.

[256] The MASTER.—I suggest that you refer always to the exhibit number. For instance, in starting the description say "Defendants' Exhibit 'A' shows 14-P" and so on, or whatever it is.

The WITNESS.—Thank you, I will. Defendants' Exhibit "A" shows a plan and side elevation of the main working parts of the 14-P double seamer, showing in the plan view of this exhibit.

A. The cans are carried by a chain feed, not shown in the blue-print Exhibit "A," but shown on

(Testimony of Roy Augensen.)

page 2 of Exhibit "C," which chain feed I will mark "2," and are carried directly under the cap feed mechanism 3; and before reaching cap feed mechanism 3 the can acts on a trip lever, a no-can-no-cap trip lever, which I will mark 4 on Exhibit "C," which trips the cap feed mechanism and allows the cap to be cut off from the rest of the stack, which stack I will mark 5 in Exhibit "C." Referring to Defendants' Exhibit "A," figure 1, the cap is pushed forward with the can and directly above same, which cap I will mark 6, being pushed forward until directly above recess in star wheel, into which can and cap is pushed.

A. I will mark the location of the can and cap as 7.

[257] A. I will mark those 8. The cap being pushed by a center pusher, which I will mark 9 on Exhibit "A." When the center pusher has come to the end of its stroke the cap is directly over the recess in the star wheel, which I will mark 10. There is arranged directly above the recess in cap feed mechanism 3 pusher, which I will mark 11.

The MASTER.—That works vertically, doesn't it?

A. Yes, sir, that works vertically, and is only a factor of safety in getting the cap down into the recess so that there will be no hanging up in the cap.

Q. Does it leave a space above the can top?

A. Yes, sir, there is a space above the can top and the can top pusher. It is just to start the cap

(Testimony of Roy Augensen.)

through. It doesn't force it completely down with the can. Then the star wheel which I have marked 10 revolves intermittently.

Q. It revolves clockwise, in other words.

A. Yes, sir. As the can top and can are carried together there is a tapered upper guide, under which can and cap ride, this taper being to gradually force the top down on to the can in case of packing foodstuffs that stick above the can, and is completely [258] down on can when it reaches the first operation seaming station, which is so shown.

Q. Mark by the character or reference 11 the tapered guide you referred to that serves to press the cap down on the can.

A. The tapered guide is not shown on this print.

Q. Can you show it in pencil schematically?

A. Yes, sir; which I show by the figure 12.

Q. What serves to carry the cap forward during that progressive movement of the star wheel 10?

A. There is a shoulder or finger on each recess in this star wheel No. 10 that carries the cap forward to first operation station with the can.

A. I will mark it 13 (marks). After can and cap together have been delivered to first operation seaming station there is what we call a lower chuck, which I mark 14 that raises can and cap together, and forces same into seaming head, which I will mark, in Exhibit "C," 15. The first operation of seaming is performed by two rollers, which I will mark "Part of Exhibit 'P'" by the rotating

(Testimony of Roy Augensen.)

around the can, the can standing still, and Exhibit "P" revolving around the can, gradually rolling the top and body of can together.

Q. (By the MASTER.) How many revolutions did you say?

A. There are six revolutions in this operation. After [259] the seaming operations are completed the can is transferred on to the second operation seaming station, which is so marked here in Exhibit "A," Fig. 1.

Q. Now, how is that pressure applied? Is it the same pressure at the first revolution as at the last, or what?

A. No, sir. The rolls are gradually brought in at each revolution—are gradually brought in all through the operation, and then released quickly to allow the can to come out.

Q. And that bringing in is effected by what means?

A. By means of the cone, said cone being stamped with the figure "2" on said Exhibit "P."

A. The transfer from one station to the other is done by means of a star wheel that carries the cans from one to the other.

Q. A star wheel, by gripping arms?

[260] A. Gripping arms; or I would call them recesses.

Q. Well, what keeps the can from sliding down?

A. There is a shoulder in its recess.

Q. (By Mr. TOWNSEND.) And to keep the cans in the recess from falling outwardly—

(Testimony of Roy Augensen.)

A. There is an outward curved rail.

Q. Will you indicate roughly there in pencil this rail that keeps the cans in the recess, and mark that?

A. I will mark that "17" on Exhibit "A," Fig. 1. At the second operation seaming station there is also a lower chuck which I will mark "18," which raises or forces the can to the upper chuck. Here the can revolves, being driven at both ends by upper and lower chuck, and finishing seam, or ironing out the seam, is performed by the action of a compression roller against seam, which I will mark "19," and is operated by a lever "20" in connection with cam "21," which I will so mark in Exhibit "C."

Q. Now in connection with the spinning of the can on the second seaming operation, how is that spinning effected—by the upper or lower chuck?

A. By both the upper and lower chuck, both being driven.

[261] A. Yes, there is shown the driving means of the upper and lower chuck of second operation seaming station, which drive means I will mark "22" and "23."

Q. Now mark the lower and upper chucks 18 and 18', respectively.

A. (Marking.) 18 and 18'

Q. Now, on Fig. 2 of Exhibit "A" can you illustrate the means for operating the can on Exhibit "P"? A. Yes, sir.

Q. Just mark the cone "Exhibit 'P'" and mark

(Testimony of Roy Augensen.)

the lever for operating that by the next character—25, is it not?

A. (Marking) This cone is operated by lever “25” and cam “26.” Now I have applied the same characters to the same elements in all of the figures as far as seems necessary. Fig. 27 shows knockout mechanism for releasing can from upper chuck when seaming operation is completed.

Now we left the can here at the second operation. It proceeds on intermittently until it is carried out of a recess in turret by ejector paddle, which is not shown but was seen on the 14-P machine that was operated this morning.

Q. (By the MASTER.) Where does your can first stop in 14-P while being operated?

A. It is carried along here and pushed into here and carried to that point there (indicating on Exhibit “O”). That is, after the cap is placed on to the can and carried on—

[262] Q. That is, the cap is clear down on top before it stops?

A. Yes, sir. It is carried down gradually from the time it drops until it reaches this position here.

Q. (By Mr. TOWNSEND.) Indicate the first point of stop by an arrow and just call that “First stop of can.”

(Witness marks exhibit.)

Q. (By the MASTER.) Now your next stop.

A. The second stop is indicated by the words “Second stop.”

Q. (By Mr. TOWNSEND.) Now I wonder if

(Testimony of Roy Augensen.)

we all understand each other. The Master's question seemed to involve two matters, or you apparently understood it was two matters. The Master asked, as I understood, where was the first stop of the can as it came along, and you had previously described how the can was gradually fed down under the guide which you marked "12" on Exhibit "A," so that the cap progressed along as pushed by the finger "13" some distance.

A. Yes, sir.

Q. Now, let us have it clear as to where the cap comes down on the can—

A. Completely under the can?

Q. Yes.

The MASTER.—I thought he went into the full details of that. As I understand it, the can does not stop until it is picked up by the revoluble disk used to feed it into the first station here; then when that disk revolves a portion of [263] the way it stops, then it goes on and stops again, and then the can goes on to the first station.

A. That is correct.

Q. (By Mr. TOWNSEND.) And where is it that it finally gets the cap?

A. Completely down on to the can?

Q. Yes.

A. Just as it goes under the first operation head.

Q. (By the MASTER.) Under what?

A. The first operation double seam head, Exhibit "P."

Q. You mean when it gets to the first station?

(Testimony of Roy Augensen.)

A. Yes. Then it is exactly down on to the can.

Q. Then it stops twice before it gets under "P"?

A. Yes, sir.

Q. And what keeps it from spilling the contents before the can top is clear down?

A. Well, on the 14-P there is a certain amount of spill.

The MASTER.—All right.

Q. (By Mr. TOWNSEND.) That depends on the speed you operate it, I suppose?

A. The speed, and also on what product is being packed. Of course there is no spill to fish.

Q. (By Mr. BLAKESLEE.) May I ask right there: In your larger sizes of cans with the 14-P is it not necessary to slow down very much to prevent that slopping over at the tops of the machine between the stations?

[264] A. That is true in any machine.

Well, now, how about 14-P; isn't that true?

A. You can run a smaller can faster than a large can.

Q. And at what rate per minute can you operate a 14-P with a gallon can?

A. That is a 19-P we call it; that is identical with the 14.

Q. Well, the 14 type, with a gallon can for capping sloppy contents.

A. They have been run thirty a minute.

Q. (By Mr. BLAKESLEE.) What is the slowest you have seen it run?

A. Twenty-two cans a minute.

(Testimony of Roy Augensen.)

Q. But under all those conditions the 24-P can operates faster, can it not, with similar materials and similar sized cans? A. Yes, sir.

[265] A. Well, I don't just remember what size cans were running at different places and the different speeds; but you can run a smaller can, say 1-pound tall, faster than you can a 2½-pound or 3-pound can.

A. The speed the 14-P was operating this morning?

Q. Well, yes; what was it operating at this morning there? A. At 60 cans a minute.

[266] Q. And what have you seen it operating at in plants?

A. 75 is what I have seen it operate on on apricots in 2½-pound cans.

Q. (By Mr. TOWNSEND.) Now, just briefly state in Exhibit "P" the operation of the can itself on the first station and on the second station, as to its rotation and non-rotation.

A. The can on the first station is stationary, and on the second the can revolves, during seaming operation.

Q. (By Mr. BLAKESLEE.) May I ask the witness where it was he observed that 75 per minute speed with apricots?

A. That was in Ontario, California, at the Golden State or the—there is the Co-operative and one other. It was not the Co-operative but the other plant. Now if that is the Golden State or Golden West—

(Testimony of Roy Augensen.)

A VOICE.—Golden State.

A. Golden State. They had some 14-P machines running there.

[267] Q. Do you know what year that was?

A. That was this last season.

Q. (By Mr. TOWNSEND.) In the fall of 1922?

A. Yes, sir.

Q. Now, will you briefly describe the operation of 24-P as it was noted this morning, and refer to any drawings or photographs that you desire to refer to in that connection?

A. Referring to Exhibit "B," the cans enter under disk marked "10" and are carried on to table "19," these being separated or timed by the action of bell cranks or fingers marked "15." These fingers 15 separate the cans with a horizontal action between said can bodies.

Q. (By the MASTER.) Is there any vertical motion in those fingers?

A. No, no vertical motion.

Q. (By Mr. BLAKESLEE.) The outer ends of the lower portions, or the toes, rise as the bell cranks rock, don't they, to an extent?

Mr. TOWNSEND.—There is only such motion as is incidental to the oscillation—

Mr. BLAKESLEE.—Well, please let the witness answer.

A. Well, that would be radial, I would think.

Mr. TOWNSEND.—We will have a portion of the machine illustrating that feature as soon as it can be assembled at the plant. Probably it will be

(Testimony of Roy Augensen.)

ready to-morrow. And that will show the action of the bell cranks.

[268] Mr. BLAKESLEE.—I am trying to avoid lengthy cross-examination by putting a few little questions as we go along.

Q. (By Mr. BLAKESLEE.) Isn't there a lift to the forward end of the toe as each one rocks?

A. Yes, they rock, but they sometimes won't rock.

Q. They are intended to rock, are they not?

A. In case of necessity they are. If the cans come together, or if a can should come exactly right, they will not rock; it will just pick the can up. Now, these fingers 15 are mounted on a turret here marked "14," and are operated by a cam 16.

A. Yes, sir. When fingers 15 reach a point which I will mark "50" the cam takes action on said fingers and throws fingers 15 outwardly, thus increasing speed of can from point 50 until received in pockets 20. From this point they are increased gradually until they reach the first operation seaming station.

[269] A. (Referring to Exhibit "O.") Here the pocket receives can delivered from first timing turret marked "14" in Exhibit "B," and as they move on the pocket increases in speed by means of a chain carrying lugs riding over a cam, which is not shown here, but it is shown on the machine that was demonstrated; yes, it is shown in Exhibit "B" by figure "23," in the side elevation.

Q. And how would you describe the circumferential travel of this feed arm on Exhibit "O" which

(Testimony of Roy Augensen.)

carries the can pocket— [270] as a variable speed or—

A. Yes, sir, it is a variable speed, increasing as it goes, and after it has delivered the can under first operation seaming station it then again slows up to receive another can delivered by timing turret 14.

Q. Now, in this accelerated speed of the can and all, does the shaft around which the feed arms travel vary its speed? A. Yes, sir.

Q. The shaft itself. Does it travel fast or slow, or does it keep a uniform speed?

A. The shaft travels the same speed. That is marked "21."

Q. Then I understand that the shaft 21 of Exhibit "B" rotates uniformly at the same speed at all times? A. Yes.

Q. Although the can pocket spacing arms which are marked "20" travel at a variable speed in their orbit about the shaft 21? A. Yes, sir.

Q. Now, what is the function of that variable speed?

A. To get away from any spill by jerky feeds, increasing [271] gradually from one speed to the other. To get the can gradually through. To carry the high speeds without spilling. I might say that we increase from point marked "50" to point marked "70" from 5-inch to 11-inch travel.

Q. (By the MASTER.) What do you mean by 5-inch travel?

(Testimony of Roy Augensen.)

A. Well, 5 inches per second to 11 inches per second.

Q. (By Mr. TOWNSEND.) And from 60 to 70 what is your acceleration there, do you recall?

A. From 60 to 70 it is 7 to 11. It increases from 5 to 7 between 50 and 60, and from 60 to 70 it increases from 7 to 11.

[272] A. As the can passes a point which I will mark 80 the can acts upon trip lever 28 which trips cap feed mechanism, allowing cap to be cut off, and on the return stroke of cap feed mechanism the cover is pushed ahead by a pusher, which I will mark "81," to position directly above the can's travel, where finger 24 carried by pocket 20 will pick up cap and carry same directly with can to first operation seaming station, which is 70. That is the end of the stroke, you see, or the increase. That is where the first operation seaming station receives the can.

Q. At approximately what point does the cap finally come down on the can; does it come down instantly or gradually?

A. The cap being carried down gradually on top of the can and actually being placed on the can, the center of cap being the distance of the diameter of the cap away from the center of the double seam head as shown in Exhibit "P."

Q. Mark that point where the cap comes down finally on the can as "82."

[273] A. The finger is raised and lowered in the same relation as the cap is carried down on to

(Testimony of Roy Augensen.)

the can by means of a cam which I will mark here "83." Now, here the finger is down; as it travels it rises up to catch this cap and then it comes down gradually.

Q. (By the MASTER.) Is there any interruption in the movement of the can up to the point you have now carried it?

A. There is no interruption; no, sir.

Q. A continuous motion?

A. A continuous motion.

[274] A. When the cap is cut off in the 14-P the cap drops on to a plate that supports the cap and is carried forward on that plate, the same as in the 24-P feed, and delivered directly above the pocket in the star wheel. That delivers can and top together the same as this pocket in this what we might call star wheel (indicating on Exhibit "O").

A. After it has been delivered it is carried by a finger mounted on the said top, with the can, and it is forced down by means of an upper guide on to the can. And the same way here.

A. Yes, 24-P. The cap is carried down an incline and forced down on top of the can just before it reaches the seaming station.

[275] A. The cap is supported by these rails which are marked 26 and 27 in Exhibit B in Figure 1, and is delivered by a finger carried by said pocket, and gradually forced down on top of the can by a bracket to which these rails are fastened.

Q. (By Mr. TOWNSEND.) On this model Exhibit "O," approximately to the end of the tan-

(Testimony of Roy Augensen.)

gential rails here appears to be a cross metal piece, which I will ask you to mark with a sharp instrument with "X."

A. (Witness marks.)

Q. And a tin guide extending from "X" around in the same direction, extending circumferentially, which I will ask you to mark "Y."

A. (Witness marks.)

[276] Q. And this tin guide, Y to X, connects with a plate which is stamped "419." Between plate 419 and the radial bar X appear two little flanges, these flanges being below and beyond the rails which have carried the cap. What are those for?

A. Those flanges that Mr. Townsend spoke of are to receive the flange of can and can cap where said can and cap meet, and are forced down by plates marked 419 and 420.

Q. And that is all done before it gets to the first seaming station? A. Yes, sir.

The MASTER.—And then the can passes in a plane that doesn't raise or lower at all?

A. It doesn't raise or lower. The cap is brought down on to the can. The can stays at the same level all through the machine except when the lower chucks raise it up to the seaming head.

Q. (By Mr. TOWNSEND.) Right there, is there any difference in operation where you have a can particularly filled with sloppy material, traveling always on the same horizontal plane as it does in this device 14-P, and 24-P, and shown by defend-

(Testimony of Roy Augensen.)

ants' Exhibit "O," and having the cap travel down to meet the can, than from a situation where you have the can gradually traveling upward to meet a cap? A. Yes, sir.

Q. Explain what that difference is and what it amounts to.

[277] A. When the cap is carried down on to the can the can is carried at the same level, not being tilted in any way. There is no spill to the cap and it is carried on down with the can. By carrying the can at the same level and bringing the can up the can is tipped and therefore can spill some of the brine out of the can as it comes up.

The MASTER.—What did you say was the difference between the method of carrying the can top in 14-P and in 24-P through these arcuate rails? They both use the finger, don't they?

[278] A. They both use the finger to carry the cap.

Q. (By Mr. BLAKESLEE.) To perch the cap?

A. The 14-P has the finger to carry the cap or advance the cap with the can. That is mounted on a pocket that carries the can.

Q. (By the MASTER.) And the pocket carries the can top as well as the can?

A. Yes, sir. And then on the 24-P we have a pocket and a finger mounted thereon to carry the cap and the can together.

[282] Q. In 14-P the cap, after being delivered over the top of the can, has what sort of a travel? Circumferential or [283] otherwise?

(Testimony of Roy Augensen.)

A. Circumferential with the can.

Q. In 24-P, represented by Exhibit "O," after the cap is delivered over the can what sort of a travel does the cap have with respect to the can: circumferential or otherwise?

A. Circumferential, yes, sir.

Q. In 14-P you have referred to the rails 12 and 30, and their function is what?

A. To hold the cap into pockets which are used to deliver the can and cap.

Q. In other words, those rails are for the purpose of maintaining the circumferential travel of the can cap while it is progressing to the can?

A. With the can to the first operation sealing station.

Q. As I understand it, the cap is delivered actually on the can just shortly before it reaches the first seaming operation?

A. Onto the can; but they are delivered together; of course; not fastened together, but delivered together.

Q. In 24-P the function of those curved rails is what?

A. To hold the cap and can in unison, or together, as they are fed to the first operation seaming station.

Q. In other words, to maintain the relative circumferential movement of the cap with respect to the can? A. Yes, sir.

Q. (By Mr. BLAKESLEE.) But before the cap comes onto the can, [284] is that correct?

(Testimony of Roy Augensen.)

A. After, also.

Q. (By Mr. TOWNSEND.) And in both the 14-P and the 24-P the advance of the cap through its circumferential movement is done by what? A finger you referred to, I believe.

A. By means of a finger mounted on the pocket, which is marked 13 in Fig. 1, Exhibit "A," and 24 in Fig. 1 of Exhibit "B."

Q. And in each case it seems apparent that the cap is gradually fed down onto the can during the circumferential movement of the two together, and finally deposited on the can before it gets to the first station? A. Yes, sir.

Mr. TOWNSEND.—Pardon me for assuming to ask leading questions, but I was only summarizing.

The MASTER.—That is all right. There is this difference, as I understand it, in the two mechanisms: The 24-P feeds the cap down gradually.

A. Yes, sir.

Q. Which the 14-P doesn't do?

A. The 14-P feeds the cap down gradually when canning, say, peaches or apricots, where they are food products sticking above the can and the cap is held above the can by these products, and that upper rail acts to guide the cap down onto the can, guides it down on the can before it gets to the seaming station. If that were not there when it came to the seaming station it would push the cap off.

[285] Q. (By Mr. BLAKESLEE.) But in

(Testimony of Roy Augensen.)

24-P the cap is guided down on the curved rails gradually to the can, is it not?

A. Yes, it is fed down gradually onto the can.

Q. Riding on the rails? A. Part way.

Q. (By Mr. TOWNSEND.) Just continue with the description of the operations in the 24-P machine. You have brought the can and cap now to the first seaming station.

A. After the cap and can are delivered directly under the first operation seaming head, Exhibit "P," which I will mark on Exhibit "B" Figure 1, the can and cap together are raised up to said seaming head by means of a lower chuck marked number 29 in Figure 2 of Exhibit "B." The can is held stationary between an upper chuck, which is not shown here but is shown on Exhibit "P," and lower chuck number 29 in Fig. 2 of Exhibit "B," and are held in that position. The double seam head, which carries rolls, which I will mark "84," revolves around the stationary can, gradually rolling the top and body of can together. While this is being done the can and double seam head are advanced with the turret, and together, until the seaming operation is completed.

Q. Do you mean the first seaming operation?

A. Until the first seaming operation is completed, and is released from the upper chuck and rolls.

Q. How many times does the seaming head P revolve in machine 24-P in forming the first seaming operation?

(Testimony of Roy Augensen.)

[286] A. It revolves six times.

Q. That is the same as you have stated it did in 14-P?

A. Yes, sir. The can is then transferred to the second operation station and raised by lower chuck 33 to the upper chuck which is marked 34, both upper chuck and lower chuck being driven in unison, and clamping the can between the same rotates can, and by action of cam 36 on a lever, which I will mark "85." Said lever, carrying roll 34, is gradually brought in toward spinning can, the can rotating five times from the start of the action upon the can by roller 34, until roller 34 is released. Then the can is released and ejected from machine by the ejector paddle, which I will mark "86."

Q. How does seaming roller 24 of Angulus 24-P, Exhibit "B," compare in operation with the seaming roller 19 of Angelus 14-P, Exhibit "A"?

A. The roller, as I stated, in Exhibit "B" of the 24-P closing machine is brought in and out by means of a lever and a cam. In the 14-P in Exhibit "A" the roller 19 is brought in and out by means of lever and a cam. As the second or finishing seam is performed and the can is spinning, the can is also advanced with the turret to its point of extraction, or the finish of the seam.

Q. (By the MASTER.) What do you mean by turret?

A. The turret is the second station that carries

(Testimony of Roy Augensen.)

the four spindles, the second operation seaming station that carries the four spindles.

[287] Q. (By Mr. BLAKESLEE.) In the revolving part in which the cans are carried the second seaming operation is performed?

A. Yes, sir.

Q. (By the MASTER.) Isn't there a first turret?

A. Yes, sir, there is a first turret or first station that revolves, carrying the cans between two spindles while the first operation seam is performed.

Q. (By Mr. BLAKESLEE.) By Exhibit "P"?

A. By Exhibit "P," yes.

Q. (By the MASTER.) How is the can transferred from one turret to the other?

A. It is transferred by means of a 3-pocket star wheel.

Q. And the under support for the can is what?

A. The under support while being transferred is a table, which I will mark "87."

Q. (By Mr. BLAKESLEE.) Mark the star wheel you have referred to, please.

A. The star wheel is marked "32."

Q. And that has five pockets in its periphery?

A. Three pockets.

[289] Q. (By Mr. TOWNSEND.) Will you just briefly refer to the seaming operations in the two machines 14-P and 24-P by comparison, for the first station and the second station in each?

A. In the 24-P the first seaming station and

(Testimony of Roy Augensen.)

seaming operations are identical with the first seaming operations in the 14-P, the can standing still and the rolls revolving around the can to do the double seaming. In the second operation in the 24-P the can is spun and the finishing seam performed by a roll pressing against the spinning can. In the 14-P it is identically the same, the can spinning and the roll acting against the spinning can to make the finishing seam.

[291] Q. This morning at what speed of operation or can delivery did you run the 24-P? You have referred to the speed of the 14-P as being approximately 60 cans per minute.

A. Yes, sir. The 24-P was run at two different speeds. At first we ran the 24-P at 125 cans per minute, and later on shifted the machine and it was driven off of a larger pulley, and was run at 210 cans per minute.

Q. What do these two speeds represent relatively? Do they bear any relation to what is done in actual practice with these machines, or was that apparently display run you made this morning?

A. It is practically used; it is no display. We don't intend to put on anything like that. It is just what we can do and what we will do wherever we put the machines.

Q. (By the MASTER.) It was to indicate the speed at which filled cans were operated through the machine, and 210 was where they were putting on the bottoms of the cans? A. Yes, sir.

(Testimony of Roy Augensen.)

Q. (By Mr. TOWNSEND.) What speeds do you know this 24-P to be run at for filled cans?

A. It is being now run at 128 cans per minute.

Q. With filled material?

A. Filled with pork and beans—cans filled with pork and beans.

Q. What has been the highest speed that you know of for running it with empty cans and seaming cans at that speed?

[292] A. 220 cans per minute.

A. Yes, I tested two cans, one a finish seam and one a [293] first operation seam. The finish seam did not leak when the pressure gage reached its limit, which was 40 pounds pressure. The first operation seam held 15 pounds pressure before it leaked.

Q. (By Mr. TOWNSEND.) Will you just produce the can that was double seamed on both ends and withstood the 40 pounds pressure without collapse?

A. Yes, sir. This is the can we tested that held 40 pounds limit of the pressure gage and did not leaked.

Mr. TOWNSEND.—Let this be marked Defendants' Exhibits "S."

Q. Which end of this Exhibit "S" was double seamed in the two operations on the 24-P this morning.

A. The end that is marked with the cross and the letter S.

(Testimony of Roy Augensen.)

Q.. What kind of a machine put the other end on, or where did you get the can?

[294] That is an American Can Company can.

Q. (By Mr. TOWNSEND.) Have you at any time ever made tests or seen tests in excess of 40 pounds?

A. Oh, yes. There are seams that I have held at 65 pounds.

Q. What machine was this can Exhibit "S" double seamed on this morning?

A. That was double seamed on 24-P.

Q. And at what speed was that run when you made that seam? A. At 210 cans per minute.

A. You referred to a test of a can on which the can was only run through the first seaming operation by the rollers [295] similar to Exhibit "P."

A. Yes, sir.

Q. Can you produce the can that you tested?

A. Yes, sir. This is the can that was tested, and this can held 15 pounds pressure before it leaked, and the end that was put on is marked with two crosses.

Q. Will you mark that can you just referred to as Exhibit "T"?

A. (Witness marks.)

Q. At what rate of speed was this top put on by the first seaming roll shown by Exhibit "T"?

A. That was seamed when the machine was running 210 cans per minute.

[296] A. This was run right straight on and kicked out at the other end, the one with the finish seam marked S; and this one marked T, of course

(Testimony of Roy Augensen.)

it had to be taken out before it reached the second operation turret so it was only run through the first operation.

[297] Q. I show you now a can which is approximately 3 inches in diameter, and bears the mark "No. 2, First oper. 12-22-22, Weber," this being one of the cans that Mr. Weber marked at my instance on our visit the other day, on that date, to the plant of the Pacific Company, and ask you if you have seen that can before. A. Yes, sir.

Q. Tell us what has happened to it.

A. I proceeded to test this can the first operation seam but on the first downstroke of the pump the bubbles came up from all around the seam.

Q. Approximately what pressure did you get from that can on that test before it leaked?

A. I couldn't say as to what pressure, but the air went through there and out the other end where it was leaking.

Q. Did you get 15 pounds?

A. No, sir; it was a fraction of a pound.

Q. You mean the first stroke of that pump that was operated this morning it showed signs of leakage? A. Yes, sir, it showed bubbles.

Q. Were you able to make and register as to the pressure it stood? A. No, sir.

[298] (By the MASTER.) What was those little indentations there in the can, or cuts in the edges?

Q. (By Mr. TOWNSEND.) What are those indentations?

(Testimony of Roy Augensen.)

A. I filed that seam to see the construction of it.

Q. When was that done? Before or after you made the test?

A. That was after I made the test.

Q. In what position was the can at the time you made the test?

A. It was whole. There was nothing done with it.

Q. And you filed it afterwards for what purpose?

A. To see why it didn't hold the pressure.

[299] Q. Are you able to state from your observations why it has not held?

A. The only thing is it isn't rolled tight enough; it isn't tight.

Q. On this other end there is a filing and a little piece of flange on the cap turned up. What does that represent?

A. That represents the filing of a finished seam.

Q. What do you mean by the finished seam?

A. Why, after both operations have been performed.

Mr. TOWNSEND.—I will offer this can made on the Pacific machine, just referred to by the witness, as Defendants' Exhibit "U."

[300] 514 Post Office Building.

Los Angeles, California, Saturday, January 6, 1923,

10:00 A. M.

(Appearances as previously noted.)

The MASTER.—You may proceed.

ROY AUGENSEN recalled.

[301] Q. What the effect is in a can filled with

(Testimony of Roy Augensen.)

sloppy material changing its direction from a horizontal to an upward inclined direction even though the can is maintained vertically at all times; and particularly in regard to the comparison of such a motion with that that pertains in the defendants' machine where the can always moves in a horizontal plane and the cap comes down to meet the can.

A. My judgment would be that a can traveling horizontally and then suddenly raised vertically, there would be more tendency to throw the sloppy material out of the can. There would be a sudden jar there.

[302] A. The Pacific machine that I observed operating on apricots was running in that plant 75 cans per minute, and—

Q. What plant was that?

A. That was at the Golden State Cannery, at Ontario, California, and also the Co-operative Cannery at Ontario.

Q. When did you observe those Pacific machines?

A. That was this fall. I don't just remember the month.

Q. At what rate was it operating at the Co-operative?

[303] A. They were running at the same speed, 75 cans per minute.

Q. Now, what have you known the 24-P to operate at under like conditions?

A. We were running the 24-P on standard packing tomatoes, which is very sloppy, at 96 cans per

(Testimony of Roy Augensen.)

minute, and on pork and beans at 128 cans per minute.

Q. And what size cans were you using in the Angelus 24-P operating at 96 on tomatoes and 128 on beans? A. $2\frac{1}{2}$ pound cans on tomatoes.

Q. And the diameter of the can?

A. The diameter was $4\frac{1}{4}$. And on pork and beans it is $3\frac{7}{8}$ diameter.

[304] Q. Do you recall the size of the can that was being operated where you timed the Pacific for 75 cans per minute?

A. I didn't actually time it. I just asked the operator there what they were running them, and also Mr. Shafer.

Mr. BLAKESLEE.—We move to strike out the testimony as purely hearsay.

The MASTER.—The motion is granted.

[306] Q. (By Mr. TOWNSEND.) Mr. Wilson, in testifying here on behalf of the plaintiffs, has stated that the Pacific has replaced the 14-P at Pomona and replaced the 14-P in the Golden State Cannery at Ontario and in the Golden State at Cucamonga, and the California Growers at Ontario and at Hemet and Riverside. What do you know in regard to that, if anything?

Mr. BLAKESLEE.—I think counsel is not correct in reflecting the record as to the 14-P at all those places.

[307] Mr. TOWNSEND.—Page 154 of the record will bear out what I have to say. I am only bringing out whether or not it is a fact that the

(Testimony of Roy Augensen.)

14-P has been displaced in those places, or all of them or any of them.

A. All that I can say about are the factories at Ontario and Pomona. Those are the only factories that I visited. And at the Golden State in Ontario there were either two or three 14-P's running on apricots at the time I observed the Pacific machine. I think they had three machines in there also.

Q. Who had three machines?

A. The Pacific Machine Company. There were three Pacific machines running there. And at the Co-operative in Ontario they still had a 19-P closing machine, which is the same as the 14-P, only a gallon size. And in Pomona when I visited that factory they were not operating, but in their lineup they had—I wouldn't say the number, but there were 14-P's in their lineup.

Q. You mean the cannery wasn't in operation at all?

A. The cannery was not in operation at that time.

Mr. BLAKESLEE.—Counsel has not fixed the time, I don't think.

Mr. TOWNSEND.—He said he observed the Pacific last fall, in 1922.

A. That was when I observed the Pacific machine.

The MASTER.—How does that disprove that they were not replaced by other machines?

Mr. TOWNSEND.—The inference that was left was that the [308] 14-P's had become obsolete

(Testimony of Roy Augensen.)

and ancient, and we are going to show that the 14-P is very much on the map to-day.

Mr. BLAKESLEE.—They may be there, but not used. The question is whether they are used, and counsel had admitted the plant wasn't in operation.

Q. (By Mr. TOWNSEND.) Are you able to state to what extent 14-P machines are in use, if at all, to-day.

A. I know of a great many and have seen a great many in use in the east and right here in the city there are a number in use.

A. There are a great number, I couldn't state the exact number, used at Heinz plant in Pittsburg for can making and also canning that is, putting the bottoms on and the tops after they are filled, and the Sears-Nichols Company, their headquarters being at Chillicothe, Ohio. They have a number of 14-P machines.

A. Ever since I have been in the can and canning game I have seen 14-P's running all through the east. I couldn't [309] state just exactly where or anything about it. I wasn't that much interested at that time. Here in Los Angeles there are 14-P's operating at E. C. Ortega's plant on Santa Fe Avenue. By the way, I think they have finished their canning season but they were running up until Christmas.

Q. How many 14-P's were running at that time?

A. I have seen them run seven 14-P's, the seven including one 19-P gallon machine. This last season there were 14-P's, as I stated before, operating in

(Testimony of Roy Augensen.)

Ontario, and in Wilmington at a fish cannery there.

Q. Your work since you have been with Mr. Guenther has been mainly inside work, has it not?

A. So far, yes, sir.

Q. Do you know, while you have been connected with the Angelus Can Company, the defendant, whether they have sold [310] any 14-P's recently, and if so, state what your knowledge is on the subject?

A. Yes, I know of them selling five 14-P's this last year, 1922. There were two sent to the Tacoma Can Company and two to Chicago to Morris & Company, and there was one sold to E. C. Ortega on Santa Fe Avenue.

Q. (By the MASTER.) What do the 14-P's sell for? A. \$1,000.

Q. And what do the 24-P's sell for? A. \$2,500.

Q. Do you know what the Pacific Closing Machine Company's machine sells for?

A. No, I do not.

Mr. BLAKESLEE.—If the Master wishes to know and counsel will permit we will make the statement they sell for \$1,950.

Mr. TOWNSEND.—Very well, I will accept your statement. We might also stipulate, as I think everybody is agreed upon it, that the Pacific Machine that we saw operating at the Pacific plant on December 22, 1922, was operating at the rate of 96 cans per minute on $2\frac{7}{8}$ inch diameter cans. That is true, is it not, Mr. Berry?

(Testimony of Roy Augensen.)

Mr. BLAKESLEE.—Was that the size of the can?

Mr. BERRY.—Yes; and that was approximately the speed.

[311] Mr. TOWNSEND.—Mark the cam on Exhibit “O” with a cross.

[312] Q. (By Mr. BLAKESLEE.) Are you sure that it was in August you saw the machines operating at the Ontario plant?

A. I don’t remember stating that it was in August.

Q. When was it?

A. I wouldn’t say the exact date. That could be verified by a report that I handed in to our Company. But I would just mention that it was this last season.

[313] Q. When was it you saw them back east?

A. That was at the time I was with the American Can Company; but since then I have seen orders for repair parts for 14-P machines.

Q. When was it you saw them back east?

A. I couldn’t state the exact year, but it was in the time I was traveling for the American Can Company.

Q. Well, you have remembered lots of things here by stating it by months; now can’t you tell us the year you saw these back east?

A. There is a lot of things I have not remembered, and not being particularly interested in these machines at that time I didn’t take any particular notice.

(Testimony of Roy Augensen.)

Q. Well, don't you remember when you were traveling for the American Can Company?

A. Yes, sir; that is stated in my previous testimony, that I traveled for the American Can Company for five years, starting with them in 1915. It was some time between 1915 and 1921.

[314] Q. When was it you first knew of the defendants marketing a 24-P machine?

A. In 1922, in the month of March.

Q. That was long after you quit traveling for the American Can Company, was it not?

A. Yes, sir.

Q. Are the defendants making any 14-P machines now that you know of? A. Yes, sir.

Q. Building them now? A. Yes, sir.

[315] Q. (By Mr. BLAKESLEE.) Are the defendants making 14-P machines at present, if you know, in quantity?

The MASTER.—The objection is overruled.

A. At this present date they are not assembling any 14-P machines.

[316] Mr. TOWNSEND.—Will your Honor instruct the witness that he can answer the question as to whether they are manufacturing more than five at the present time by yes or no?

[317] The MASTER.—Just answer yes or no.

A. No.

Mr. TOWNSEND.—I think that ought to foreclose any further inquiry along that line.

Q. (By Mr. BLAKESLEE.) You mean not as many as five? Is that correct?

(Testimony of Roy Augensen.)

Mr. TOWNSEND.—Now that is objected to.

The MASTER.—Yes, if they are not manufacturing more than five.

Mr. BLAKESLEE.—Well, if he means that.

The MASTER.—Proceed. I don't think they are making very many of them down there according to this witness's testimony.

Q. (By Mr. BLAKESLEE.) Do you know of any packing-house plant to-day that is using 14-P machines and 24-P machines for the same kind of service—and I mean when their plants are running, of course, not right now?

A. Pardon me. By packing-house do you mean a packing-house or a cannery?

Q. Yes, where they can fruit or other commodities. A. Yes, sir, I do.

Q. Can you mention such place?

A. Heinz & Company in Pittsburg.

[318] Q. Do you recommend the purchase of 14-P machines for the same class of canning service as 24-P machines?

A. I don't quite understand "same class of canning service."

Q. I mean to handle the same kind of products with the same kind of cans. A. Yes, sir, I do.

Q. On what grounds?

A. Why, the 14-P has always been considered and is a satisfactory machine for putting a vacuum-tight top on a sanitary can, and the 24-P has also proved the same.

Q. But in no case can the 14-P compete with

(Testimony of Roy Augensen.)

the 24-P under like conditions when the factor of speed is considered; is that not correct?

Mr. TOWNSEND.—Now, that question is argumentative. If counsel wants to ask if the 24-P *is* to the 14-P, that is another question.

Mr. BLAKESLEE.—That is the same question.

Mr. TOWNSEND.—Just put it that way.

(Last question read.)

The MASTER.—He may answer.

A. No.

Q. (By Mr. BLAKESLEE.) And the difference in possible speed [319] is due primarily to the fact that it is impossible to get the same rate of speed with an intermittent machine that can be obtained with a constant motion machine. That is correct, is it not?

Mr. TOWNSEND.—Now, that question again is bad, and I object to it.

Mr. BLAKESLEE.—I am asking for the facts as to conditions.

Mr. TOWNSEND.—I want the facts brought out.

Mr. BLAKESLEE.—Counsel has asked questions as to conditions of sloppiness of contents and things of that sort, and I am asking the same question as to that factor of speed.

(Last question read.)

The MASTER.—He may answer.

A. That is correct.

Q. (By Mr. BLAKESLEE.) Now, you have seen the Max Ams machine and the Scott-Corey machine in operation, have you not?

(Testimony of Roy Augensen.)

A. I have seen a number of Max Ams machines of different types. I haven't seen the latest Troyer-Fox machines in operation.

[320] The MASTER.—He has answered that, Mr. Blakeslee.

Q. (By Mr. BLAKESLEE.) Is it not a fact that to your knowledge the Pacific machines and the 24-P machines are displacing Max Ams machines and Scott-Troyer machines in canneries?

A. Not to my knowledge.

Q. You know of no instance? A. No, sir.

Q. (By the MASTER.) In the replacing of a machine just what is done? Does the manufacturer take the old machine back?

A. That depends upon what arrangement was made between the manufacturer and the canner. In the case of the American Can Company a canner can only rent a machine from the American Can Company. In that case the American Can Company would take the machine out. Where a canner has bought, say, a Troyer-Fox machine he would have to dispose of it in some other way, the same as a piece of furniture. If you were to put in a new table you would have to dispose of the old one yourself; the manufacturer wouldn't take it back unless he gave you a second-hand price on it.

Q. (By Mr. BLAKESLEE.) Other than the Pacific machine and the 24-P machine have you ever seen a constantly operating canning machine or can-closing machine having the two turrets constantly operating with a transverse turret or table

(Testimony of Roy Augensen.)

between the two and means for performing the two seaming operations, one in each turret, in use?

[321] A. I have never seen— You mean there one seaming operation in each turret?

Q. Yes.

A. No, I don't believe there is a machine on the market like that to-day.

Q. Outside of the machines of plaintiff and defendant, of course, you mean?

A. Why, there are four seaming operations in each turret.

Q. Well, I mean the first rolling down, in the first turret, or the first forming of the seam in the first turret and the rolling down of the seam in the second turret. A. Yes, I have.

Q. Where?

A. The 14-P double-seams in the first station, or starts the seam, and finishes it in the second.

Q. But that, of course, doesn't have the other elements of my question, to wit, a first revoluble turret and a second revoluble turret and a transfer turret between. Isn't that correct?

A. Oh, a revoluble turret?

Q. Yes. A. No, I have not.

Mr. TOWNSEND.—It has a transfer means between the two stations, though, has it not?

The MASTER.—Oh, well, he will stipulate to that.

Mr. BLAKESLEE.—Well, that is not in point. It is so far [322] from the question that it is absurd.

(Testimony of Roy Augensen.)

Q. (By Mr. BLAKESLEE.) Now, referring to Exhibit "C," the circular, and the cut of the 14-P machine on the second page, when did you first see a 14-P machine having this feature (referring to Exhibit "C") which you have surrounded by a pencil marking?

Mr. TOWNSEND.—You are misinterpreting the witness's testimony. He said he never had seen that feed, and in that respect he concurred with Mr. Wilson. I think you misunderstood the testimony.

Mr. BLAKESLEE.—If that is the import of it, and counsel agrees, that is all there is to it.

The WITNESS.—That is correct. I have never seen that.

Q. (By Mr. BLAKESLEE.) In other words you have never seen a 14-P machine made with that feed on it? A. No, sir.

Q. (By the MASTER.) Those you saw were with the chain, were they not?

A. A flat chain; yes, sir. That is, besides the ones that we now manufacture.

Q. (By Mr. BLAKESLEE.) Now will you please refer to Exhibit "P," and to the bottom portion of the construction, and tell me if the flange there—which is interrupted in two opposite points to permit the rollers to operate on the can—does not center the can when it rests on the chuck for the formation of the seam?

[323] A. I am not sure that I get your question

(Testimony of Roy Augensen.)

correctly, but this flange has nothing to do with the can or cap after it is placed on to the chuck.

Q. What is the purpose of that flange?

A. In the case of an out-of-round can the cap will not fit snugly down under the can, and it may be tilted. That is a factor of safety, to know that the cap is center to the chuck.

Q. In other words, it centers the can and the cap so that the seam will be formed accurately, does it not?

A. In some instances; yes. But the can is centered by the feed pockets below.

Q. Well, is it not correct that it brings the cap and the can into centered relation so that the seam will be accurately formed between the cap and the can?

A. Read that question, please.

(Last question read.)

A. So that it will be accurately placed on the chuck. After it is on the chuck the flanges have nothing to do with it; the chuck holds it then.

Q. Now, what is it that causes it to be accurately placed on the chuck—the can?

A. In some instances, yes, and in some instances this has to shift that cover (indicating on blueprint to Master)—that bevel on the flange will shift the cover to center itself on the chuck.

Q. (By Mr. TOWNSEND.) That flange is what you call a centering [324] cup, is it not?

A. Yes.

Mr. TOWNSEND.—Let us just mark that

(Testimony of Roy Augensen.)

centering cup. Now will you indicate where the centering chuck is on the back of page 4 of the Angelus circular Exhibit "C"?

A. It is indicated here by the letters "A. S. C. M. Co." in Exhibit "C."

(Previous question read, as follows: "Q. Well, is it not correct that it brings the cap and the can into centered relation so that the seam will be accurately formed between the cap and the can?")

A. Didn't I answer that?

Q. (By Mr. BLAKESLEE.) No; there was an interruption after that.

A. Why, I mentioned: In some instances, yes.

Q. You never knew of a 24-P machine being built or used that did not have that centering flange on it, on the part like Exhibit "P," did you?

A. No, sir.

Mr. TOWNSEND.—We are perfectly willing to concede that that has been the standard practice of the defendant for at least a dozen years and perhaps longer. You will find it all set out in full and described in detail in the 1908 and 1912 Guenther patents.

[325] Q. (By Mr. BLAKESLEE.) Now, that flange which you have called a centering flange encircles the top of the can and the cap on it, does it not? A. Yes, I would say so.

Q. And when those parts are so encircled the rollers are forced inwardly to bring them to bear

(Testimony of Roy Augensen.)

upon the edge of the cap and the top edge of the can and form the double seam; isn't that correct?

A. While rotating?

Q. Yes. A. Yes, sir.

Q. (By the MASTER.) Do you mean while Exhibit "P" is rotating? A. Yes, sir.

Q. (By Mr. TOWNSEND.) What forms the seam—the centering cup or the rollers you have described on Exhibit "P"? A. The rollers.

Q. (By Mr. BLAKESLEE.) In other words, the actual rolling down, you mean, is caused by the rollers bearing upon the cap edge and the top of the can while they are encircled by the centering flange; is that correct?

A. Why, the rollers is all that really does the double-seaming.

Q. Well, that double-seaming could not be relied upon to be accurately performed if the encircling flange did not hold the can top and can in practically central relation, could they?

[326] A. If they didn't first place it there. The chuck holds the can and cap centrally. The flange is just a guide to bring it on to the chuck. It has nothing to do with the can and cap after the seam is started.

Q. But it still encircles and surrounds the top of the can and the edge of the can cap during the seam-forming operation, does it not? A. Yes.

Q. And after the seam has been formed in such manner the part like Exhibit "P" has to rise to allow the can to escape? A. No, sir.

(Testimony of Roy Augensen.)

Q. In other words, the can is lowered from it?

A. Yes, sir.

Q. In either case there is a relative movement between the part P and the chuck that supports the can to permit the can to escape from that encircling flange; isn't that correct?

A. I didn't understand you on that.

(Last question read.)

A. Yes, sir.

Q. Now, in the 14-P machine the cans and caps are fed while the machine is otherwise stationary; isn't that correct? And by machine I mean the rotating turret or the part that receives the cans and caps.

A. That is the only part of the 14-P that is stationary.

Q. Yes. The driving means, of course, are in operation generally, but that part is stationary at that time, is it not?

[327] The MASTER.—What part is that?

The WITNESS.—The turret that carries the cans to the first operation.

A. Yes, sir.

Q. (By Mr. BLAKESLEE.) Why do you call that part a star wheel?

A. Well, yes, that is my conception of a star wheel. That is the star wheel disk No. 10 on Exhibit "A."

Q. (By the MASTER.) Now, what part is stationary?

A. The star wheel here. When the can and cap

(Testimony of Roy Augensen.)

is fed in it stops to receive it and then it moves on. That is on the 14-P.

Q. (By Mr. BLAKESLEE.) Now do you consider the second timing means in Exhibit "O" a star wheel also?

A. No; it is a series of arms carrying pockets to receive can and cap.

Q. And, by the same token, the part 10 in drawing A is a vertically thick body having cavities or chambers in the edge portion or periphery into which the cans and caps are projected; isn't that correct? A. Carried, you mean?

Q. Yes. A. Yes, sir.

Q. And in the 24-P machine it would be impossible to feed the cans and caps into the machine in a direct radial direction, would it not?

A. Unless the mechanism was changed to an intermittent motion.

[328] Q. Yes; due to the fact that the motion is continuous in machine 24-P you have to feed the cans and caps on the run, so to speak, haven't you?

A. Yes, sir.

Q. And that is the reason you use the structure as shown, for instance, in Exhibit "O," so that the cans and caps are brought in in circles or curved paths outside the constantly rotating part and gradually into that part; isn't that correct?

A. Yes, sir.

Q. (By the MASTER.) Do you mean the wheel designated "10" on Exhibit "A" stops to receive the can? A. And cap; yes, sir.

(Testimony of Roy Augensen.)

Mr. BLAKESLEE.—Each time that the two are fed together.

Q. (By the MASTER.) Now you have marked on this blue-print the first stop.

A. Where the can first stops. You asked that question, where the can was first stopped.

Q. After it is fed in.

A. After it is fed in.

Q. But there is a stop up back of that where the figure "11" is marked here.

A. That is a stop, but the can is not in there as yet. The minute the can gets into the pocket it moves ahead. The can really doesn't stop until it has changed its course. It is timed accurately so that as soon as the can is fed into the [329] pocket it is carried forward to that position of first stop.

Q. (By Mr. BLAKESLEE.) And in the 14-P machine, during all operations of seaming, including the seam forming and the seam rolling down, the can and cap are carried intermittently by the same rotating member marked "10" on Exhibit "A"; is that correct? A. Yes, sir.

Q. Whereas in the 24-P machine the can and cap are carried successively by three different rotating members—to wit, the first turret, then the transfer rotating member, and finally the second rotating turret; isn't that correct?

A. While the seam is being performed?

Q. Yes, including both operations.

A. Yes, sir, that is correct, with the exception

(Testimony of Roy Augensen.)

that on the second station there is no turret or pockets which carry the can.

Q. Well, what is there? A. The two chucks.

Q. But that is still a rotating or revolving part by which the can is carried during the second seaming operation, is it not? A. Yes, sir.

Q. (By the MASTER.) There are chucks on the first turret too, are there not?

A. He mentioned, I believe, that there are pockets that carry the can. On the second turret there is no star wheel [330] having pockets to carry the can; the can is carried between the two chucks.

Q. (By Mr. BLAKESLEE.) There are, however, chucks in both the first and second revolving turrets of the 24-P machine, are there not?

A. Yes, sir.

Q. And in which of these turrets do those chucks revolve?

A. Those chucks revolve in the second turret.

Q. Why?

A. Why? We use the same seaming mechanism as on the 14-P because we found that very satisfactory and we just used it on the new model machine.

Q. You mean in rolling down the seam formed in the first turret? A. In the second.

Q. I say you use it in the second turret for rolling down the seam that has been formed in the first turret? A. Yes, sir. Pardon me.

Q. (By the MASTER.) Now let me see if I

(Testimony of Roy Augensen.)

understand this. When your can comes into the first turret it goes into a pocket which carries the can around with the chucks above and below, and then that pocket delivers it into another pocket in [331] the star wheel which carries it on to the second turret.

Mr. BLAKESLEE.—Yes.

Q. And there it is not in the pocket but is held between the chucks, and then the discharge arm carries it off at the end of the operation?

A. Yes.

Mr. BLAKESLEE.—Yes.

Q. And in the 24-P machine the caps and cans are fed to the first turret in pairs, that is, at the same time a can and a cap; that is correct, isn't it?

A. Yes, sir.

Q. In the 24-P machine, and as exemplified in Exhibit "O," after each cap is started on its travel toward the first turret it passes down and on top of spaced, curved or arcuate rails or ways, does it not?

A. It is first started by dropping onto a plate and carried along that plate until it reaches these rails.

Q. Then it travels on those rails and slightly downwardly for, I believe we agreed yesterday, some 55 to 60 degrees of a circle, isn't that correct?

A. Yes, sir.

Q. And then it passes to the first turret where it comes over the can, is that not correct? It is always over the can; when it is fed it is not dropped directly over the can but it is fed ahead directly

(Testimony of Roy Augensen.)

over the can and is carried with the can, gradually coming down onto the can, and at the point [332] where the cap first comes into position above the can it would be in registration with it and above it?

Mr. TOWNSEND.—You mean co-axially?

Mr. BLAKESLEE.—Co-axially.

A. It is about the same distance.

Mr. TOWNSEND.—He wants to know, Mr. Augensen, where the can first comes directly under the cap. Isn't that true?

Mr. BLAKESLEE.—That is it, so the center of the cap is directly over or approximately over the vertical axis of the can.

A. I will have to give a measurement from where the cap is dropped until it reaches that.

Q. Is it before or after the cap reaches the downwardly inclined spaced curved rails?

A. It is before.

Q. And from that point on the cap is always directly over the can until they both are fed into the first turret; is that not correct? A. Yes, sir.

[333] Q. And then to carry the thing further, the cap is on the can, resting on it, when they both pass into the first turret, isn't that correct?

A. Yes, sir.

Q. And defendants' machine 24-P, as partly exemplified in Exhibit "O," has feeding means for the cap whereby a cap is fed for each can, under the control of that can as it moves; that is correct, isn't it?

A. Yes, sir. You mean a no-can-no-cap device?

(Testimony of Roy Augensen.)

Q. Yes. A. Yes, sir.

Q. What is it in the 24-P machine, or Exhibit "O," that causes the cap to travel as you have just related?

A. A finger mounted on pocket which carries can forward.

Q. As shown in Exhibit "O"? A. Yes, sir.

Q. It would be impossible in the 24-P machine with its [334] constant movement of turrets and transfer means between the turrets to use the can and cap feed means, or either of them, which are part of the 14-P machine, wouldn't it?

A. With the exception of the cap feed.

[339] Q. (By the MASTER.) Let me see if I get this correctly: In 14-P and 24-P you use exactly the same device for feeding, do you?

A. Yes, sir. The only difference in the 14-P is that there is an extension of this plate with a recess in it for the cap to drop through into the pocket in this star wheel.

Q. I am referring to this portion back of the rails? A. Yes, sir.

Q. In other words, it is illustrated in this cut C.

A. Yes, sir; and I might mention that the under-plate here has a slot cut in it to allow this finger to pass through. [340] That of course is not in that, but the actual mechanism that feeds the cap is the same.

[341] Q. (By Mr. TOWNSEND.) Do you mean a separate piece bolted on? A. Yes, sir.

Q. (By Mr. BLAKESLEE.) In the 14-P and

(Testimony of Roy Augensen.)

24-P machines, after a cap has been separated from the stack it is pushed forward by the intermediate finger 9, is it not? A. Yes, sir.

Q. And is guided at its edges by the side fingers 8, which move with that finger 9; is that not correct? A. That is correct.

Q. And then in the 14-P machine the cap passes directly to the star wheel 10 and over a can in a pocket in that star wheel?

[342] A. Yes, sir.

Q. Whereas in the 24-P machine, after the cap has left the plate 13-a it passes first to downwardly inclined spaced rails which are curved, to start it in its motion toward the first turret; is that not correct? A. That is correct.

The MASTER.—You mean directed in its motion?

Mr. BLAKESLEE.—Started in its motion.

Q. When it leaves these curved rails it still has to travel a little further but that is the beginning of its motion over the curved rails, and in Exhibit "A," or the 14-P machine, there are no spaced stationary rails, either straight or curved, which support the cap as it moves on toward the point where it ultimately comes over the can; is that not correct?

Mr. TOWNSEND.—He has answered that half a dozen times.

Mr. BLAKESLEE.—I am summing this matter up.

A. I would say that this plate onto which the cap

(Testimony of Roy Augensen.)

is dropped supports the cap while being fed into the pocket.

Q. But that is a continuous plate and not spaced rails; is that not correct?

A. That is correct.

[344] (By Mr. BLAKESLEE.)

Q. And in Exhibit "A" and the 14-P machine the can cap moves in a straight path from the stack of caps to the pocket in the star wheel 10 over the plate 13-a, does it not? A. Yes, sir.

Q. Now, when the cap reaches the star wheel 10, or the pocket in the same, it passes under a curved ledge in the wall of the pocket and between that ledge and the can or the contents of the can, does it not? A. No, sir.

Q. The can top, then, rests in the open, so to speak, on the top of the can, or the commodity in the can, does it not?

A. If there is a product in the can it will rest on top of that; but if not the cap does not rest on the can.

[347] Q. If the can is in the pocket the flanged top of the can overlies that ledge, does it not?

A. Overlies, but not touching.

[348] Q. During that period of time what supports the can while it is pocketed in the star wheel 10? A. An under-platform or rail.

Q. And that is true as to the support of the can all the time that it is pocketed in the star wheel 10 and until its discharge from it, excepting at the two sealing stations; isn't that correct?

(Testimony of Roy Augensen.)

A. No, sir. After the can has received its first seam and is discharged from the double seam head Exhibit "P," from there on until it reaches the second operation station the can and cap with its first crimp rests on this ledge. There is no under-support on the can at all.

Q. That is from the first station to the second station?

A. To the second; and from the second to the discharge there is an under-guide.

Q. Another rail?

A. Yes, sir; supporting the can from underneath.

Mr. TOWNSEND.—Make it clear, Mr. Blakeslee, please, just for the record, that we are talking about 14-P all the time.

Mr. BLAKESLEE.—Yes.

Q. Then, as I understand it, during the motion of the star wheel 10 and a can pocketed in it the can is at no time supported by a chuck; is that correct?

[349] A. That is correct. Well, I was misled a little bit there. Except at the seaming stations.

Q. When the can is at the seaming stations the star wheel 10 is not in motion, is it?

A. No, it is not.

Q. The star wheel 10 then constitutes, does it not, a medium or member for feeding the can and top from the point at which they are brought into co-axial relation, first to the first seaming station, then to the second seaming station, and then to the point of discharge?

A. Yes, sir.

(Testimony of Roy Augensen.)

Q. In that respect it is comparable, is it not, to what you have called the accelerating member of machine 24-P, or as exemplified in Exhibit "O"?

Mr. TOWNSEND.—That question, your Honor, is objected to as argumentative and unfair and an improper attempt to draw an inference.

Mr. BLAKESLEE.—I will add to it:

Q. That is, in the respect that it is a feeding or or advancing element for the cans rather than an element organized to include chucks such as the two turrets of the 24-P machine?

Mr. TOWNSEND.—I think the question is aggravated by the addenda.

Mr. BLAKESLEE.—Read the question to the witness.

(Last question read.)

[350] The MASTER.—I think that is proper cross-examination. He is asking what the functions between the different parts are.

Mr. TOWNSEND.—Do you understand what he is driving at, Mr. Augensen? What I understand is he wants to know whether the star wheel 10 is the same as this transferring device and arm in Exhibit "O."

Mr. BLAKESLEE.—I am framing these questions, Mr. Townsend, to bring this matter out as clearly as I can, and I would like to go on without interruption. If the witness does not understand he can always ask for clarification.

The MASTER.—Let the witness inquire if he doesn't understand.

(Testimony of Roy Augensen.)

Mr. TOWNSEND.—But I don't want him to frame the questions to trip the witness.

The MASTER.—I will advise the witness that if he doesn't understand, to say so at once so that we may be sure to have the questions answered with understanding.

A. They are both used as a feeding device.

Q. (By Mr. BLAKESLEE.) In other words, the star wheel 10 in its rotation or its step by step rotation to advance the pocketed cans does not carry with it in its motion any chuck device, does it?

Mr. TOWNSEND.—Your Honor, I object to this line of questioning. He is attempting to apply for purposes which this witness cannot of course appreciate, an astute idea of comparison [351] between a can feeding means and a can transferring means in the seaming operations.

Mr. BLAKESLEE.—I am comparing 24-P and 14-P as clearly as I know how.

Mr. TOWNSEND.—If you want to compare the part of star wheel 10 where it has to do with the movement of the can top, that is one thing, with Exhibit "O"; but you know very well you can't make any comparison between Exhibit "O" of 24-P and the star wheel of defendants' 14-P in the seaming operation.

Mr. BLAKESLEE.—Counsel is coaching the witness; and, furthermore, he seems to be very much afraid of this line of examination.

Mr. TOWNSEND.—I am not; but I don't want the witness tripped up by trick questions.

(Testimony of Roy Augensen.)

Mr. BLAKESLEE.—I am here to get admissions from this witness, if that is what you call tripping, and the questions are directed to structure that you have been over again and again.

The MASTER.—Let's have the question read. I don't want so much argument.

(Last question read.)

A. No, sir.

Q. (By Mr. BLAKESLEE.) And for that reason the star wheel 10 of the 14-P machine could not be transferred to the 24-P machine as one of the two turrets of that machine and operate in that machine in that capacity, could it?

[352] A. Not in the same structure, no.

Q. The chucks in the 14-P machine always remain in fixed positions of operation, do they not?

A. Yes, sir. I suppose you pertain to the upper chucks?

Q. I am referring to the chuck mechanisms that operate upon the can and top during the seaming operations.

A. Well, we call the lower chucks that raise the can chucks also, but they don't stay in the same position; they raise up and down.

Q. But they don't advance with the star wheel 10 at all? A. No, sir.

The MASTER.—That is one of the reasons, isn't it, why they have an intermittent motion?

A. Yes, sir.

Q. (By Mr. BLAKESLEE.) The intermittent

(Testimony of Roy Augensen.)

motion is to accommodate this stationary positioning of the chuck device, is it not?

A. Yes, sir.

Q. (By Mr. BLAKESLEE.) You referred in your testimony to a run of a 14-P machine at the rate of about 75 cans per minute. [353] Where did that take place?

A. That was in Ontario.

Q. How did you obtain the figure of 75 cans per minute?

A. I asked the operator and also the superintendent at that plant.

Mr. BLAKESLEE.—Then we move to strike the testimony out. They should come here and testify.

The MASTER.—The motion is granted.

[354] Q. (By Mr. BLAKESLEE.) To your knowledge is machine 24-P used for putting the bottoms on cans?

A. To my knowledge, no.

Q. You don't know of any such use of it?

A. Not commercially, but we have put the bottoms on ourselves.

Q. Have you ever seen any machine for can closing in operation, other than the Pacific machine and the Angelus 24-P, having a cap feed mechanism, including members for supporting and guiding the cap in a curved path to a constantly rotating [355] member for receiving both cans and caps, and subjecting them to a seaming or partial seaming operation? A. Yes, sir.

(Testimony of Roy Augensen.)

Q. What machine was that, and where?

A. The American Can four-spindle.

Q. Four-spindle?

A. Yes, sir; a rotary double seamer.

Q. But that machine in addition did not have two separate continuously operating turrets with a transfer rotating part between, did it?

A. No, sir.

Q. From your observation of the canning industry during the last two or three years, are you not prepared to say that the Pacific closing machine and the 24-P Angelus closing machine have brought a revolution about in the canning industry in the respect of sure closing action and greatly increased speed taken jointly into consideration?

A. I can say as to the 24-P machine; but not having operated or been working with the Pacific machine I couldn't state.

Q. You have seen the Pacific machine in operation in many plants, have you not?

A. In two plants.

Q. They were operating successfully in those plants, as far as you could observe?

A. As far as I could observe, yes. I was never in the warehouse.

[356] Q. But you feel quite sure that what I have mentioned as to the advantages conferred is true of the defendants' 24-P machine, do you not?

A. Yes, sir.

Q. Do you not consider it a marked advance over the Scott-Troyer and Max Ams machines?

(Testimony of Roy Augensen.)

A. The 24-P?

Q. Yes. A. Yes, sir.

Redirect Examination.

(By Mr. TOWNSEND.)

Q. What was the name of the American Can Company's four-spindle machine last referred to in your cross-examination?

A. That was called the Johnson four-spindle.

Q. How long has that machine been on the market to your knowledge?

A. To my knowledge, ever since I was with the American Can Company.

Q. What was the operation of that machine? Can you tell us briefly?

A. From the time the can entered?

Q. Yes.

A. I can. The can is entered onto a disk which has a [357] series of slides which act as separators or timers to time cans on said disk and deliver the cans onto a timing chain carrying a series of lugs equally spaced. That chain carries the can forward, and in its travel acts against a trip lever tripping the cover feed mechanism. The covers in this machine are placed upside down, I would call it; that would be the paper or compound liner would be face up. The cover feed mechanism, after being tripped by the can acting on trip lever, drops, and there is a shoe that catches that cap and carries it on curved rails, the curved rails supporting the cap in its travels, and brings it, on those curved rails,

(Testimony of Roy Augensen.)

on top of the can and into the turret which carries four seaming stations. These seaming stations have the first and second seaming operation mechanism on them, The can is not transferred after it is onto the chuck that it is formerly delivered. The operation is performed in half the radius, or half the distance the can travels in the turret, and is released, and the second—

The MASTER.—I didn't understand that about the four seaming stations.

(Portion of previous answer read, as follows: "The can is not transferred after it is onto the chuck that it is formerly delivered.")

Q. (By the MASTER.) Is not transferred after what?

A. I might make it a little clearly by saying that the can is not transferred to another seaming station or set of [358] chucks after it has been delivered from the can and cap feed. Both first and second operations are performed while the can is on one chuck, not being transferred.

Q. You would have to roll the first seam at the same speed you did the second, then, would you not?

A. Yes. The can was spinning at all times, the can spinning on both first and second operations.

Q. Is that an intermittent movement or—

A. Rotary. Continuous. No intermittent movement. Continuous motion.

Q. As soon as it got on the chuck it began to whirl and kept on whirling until both seamings were done?

A. Yes, sir, and discharged.

(Testimony of Roy Augensen.)

Q. Yes. In the meantime was that turret turning?

A. Yes, sir, carrying four spindles or seaming stations.

Q. (By Mr. TOWNSEND.) Do I understand, then, that during the first seaming operation, or the first and second operations, the can was advanced through the machine continuously? A. Yes, sir.

Q. (By Mr. BLAKESLEE. This was a single-turret machine, was it not? [359] A. Yes, sir.

Q. (By the MASTER.) Your 24-P allows a faster rotation on the second seaming station, does it not?

A. No, sir; it is slower on the second.

Q. There are six revolutions on the first and five of the second? A. Yes, sir,

Q. Does the roller go any faster around the top of the can?

A. No, sir; the speed of the roller is governed by the friction of the can.

[362] Q. (By Mr. TOWNSEND.) Are there any other machines that have come under your knowledge and notice in which the can is continuously moved in a forward direction while the seaming operations are performed? A. Yes, sir.

Q. Just name them.

A. The Continental Can Company has a machine that is rotary and continuous in seaming the can.

Q. And will you describe the operation of that machine?

A. I wouldn't try to describe the exact feed of it,

(Testimony of Roy Augensen.)

as I am afraid I will not get everything, or bring something up wrong; but the seaming is performed in the same way as on the American Can Company Johnson four-spindle.

[363a] Mr. BLAKESLEE.—It must be prior to August 10, 1914.

Mr. TOWNSEND.—Well, we cannot prove it all by this witness.

Q. Now, how long have you known of that Continental machine?

A. Since 1915 when I went with the American Can Company.

Q. Such a machine was on the market at that time? A. Yes, sir.

Q. Will you describe the operation of that machine as you know it after the can with its cap is received in the seaming mechanism?

Mr. BLAKESLEE.—We object on the ground that it can't be material and can't be relevant, because the first knowledge of this witness is subsequent to the date of application of the patent Exhibit No. 3, and it can't serve any purpose in this suit.

The MASTER.—There is no foundation yet.

Mr. TOWNSEND.—I can't get it all in at once.

The MASTER.—There is no foundation unless you expect to prove hereafter that those machines were constructed or in operation or design prior to August, 1914.

Mr. BLAKESLEE.—But that wouldn't do any good, your Honor, because this witness can only

(Testimony of Roy Augensen.)

testify as to machines within his knowledge, and that is subsequent to the date which is material here. That being so, his knowledge cannot be material in this case.

[363b] Mr. TOWNSEND.—I don't want to withdraw this witness now and bring in some other witness just to bring it down to this date.

The MASTER.—I will sustain the objection, but he may answer for the purpose of the record.

Mr. TOWNSEND.—Will you read the question?
(Last question read.)

A. In this machine, after the can is clamped between the upper and lower chuck it also revolves and there is a similar construction as in the American-Johnson four-spindle machine.

The MASTER.—You mean the can spins?

A. The can spins; yes, sir.

Q. (By Mr. TOWNSEND.) And the can at the same time would progress?

A. Progress through the machine, this also being a four-spindle single turret machine, the same—not identically—it is similar in its construction of the means of bringing the first and second rollers into the can and performing the seam.

Q. (By the MASTER.) Both rolling operations are done on the same station? A. Yes, sir.

Mr. TOWNSEND.—“Station,” your Honor, is a little bit confusing. It is done on the same spindles.

The MASTER.—That is what I understood.

Mr. TOWNSEND.—A station may be at two different points.

[364] The MASTER.—Well, on the same spindle, that is what you meant? A. Yes, sir.

The MASTER.—May I ask if there is any advantage in performing the operation in two different spindles, or two different stations, over what there is in performing both the first and second operations on one? Is that objectionable?

Mr. BLAKESLEE.—That is one of the main contentions on our part.

Mr. TOWNSEND.—For the purpose of the patent here we don't think it cuts any figure, but there are two well recognized modes in the art; doing the double seaming on one spindle continuously, or doing it on two stations by an intermittent machine, or doing it at two stations by a continuous machine. Those are all well recognized, distinct lines of endeavor, and it seems to be largely a matter of choice with the different machine manufacturers as to which type they adopt.

The MASTER.—Well, I will withdraw the question.

Mr. BLAKESLEE.—We, of course, say that it is mere argument and it enters into one of our main contentions, the making of the first seam on a moving carrier or turret, the first seaming operation, and then completing that seaming operation on a second moving carrier or turret, each turret being equipped by parts moving with it; that to do those performances in combination with transfer means

(Testimony of Roy Augensen.)

between gives the acme of perfect mechanical conditions to produce a speed, and that [365] is one of the gists of our invention.

The MASTER.—My only inquiry was as to a portion of that, that is, whether the 14-P was superior to the American Can machine in its seaming operations, by reason of the fact that you use two stations in 14-P and the same spindle in the American Can machine.

Mr. TOWNSEND.—We will inquire into that later.

The MASTER.—All right; let's proceed.

Q. (By Mr. TOWNSEND.) We interruted you in your description of this Continental Can machine. Just give it to us again, or had you covered it all?

A. Yes, sir.

Recross-examination.

(By Mr. BLAKESLEE.)

Q. With respect to this use you told us about before where there were downwardly inclined curved rails, I think you mentioned, in conjunction with a single turret or four-spindle machine, I think you said, when did you know of that first?

A. Do you mean the machine I explained? The American Can?

Q. The first machine of those two that you said you knew of.

A. Why, they had been in use I understood, but the first I knew of them was in 1915.

Mr. BLAKESLEE.—Then we move to strike out the testimony [366] of the witness regarding

that machine, as irrelevant and immaterial, in view of the date of the patent, Exhibit 3. His knowledge is of a later date.

The MASTER.—Sustained.

Mr. TOWNSEND.—Well, just a minute, your Honor. This so-called can feed device wasn't applied for until 1916.

The MASTER.—Then there must be a confusion of patents.

Mr. TOWNSEND.—And furthermore, the experience of this witness in prior arts will be connected up in later testimony, that is, we haven't put this witness on for prior art strictly, but it is prior art.

The MASTER.—Do you withdraw your motion, Mr. Blakeslee?

Mr. BLAKESLEE.—I will ask that it stand, because the matter concerned both of those patents, the coincident feed covered in Claim 1 of Exhibit 3 and the two turrets covered in that patent, and the matter was pertinent to the combination of the feed and the turrets, and I think it is entirely immaterial for that reason.

Mr. TOWNSEND.—Your Honor has already ruled upon it.

The MASTER.—Well, I could withdraw the ruling if it was too expeditious.

Mr. TOWNSEND.—This testimony is directly and properly redirect in view of the testimony counsel himself brought out as to the experience of this witness. He was asked if he ever saw one of

those things, and I had him describe it; but counsel on the other side didn't want to know anything about [367] the description.

The MASTER.—All right, let the ruling stand for the present.

Mr. BLAKESLEE.—We might suggest that the motion be sustained as far as it could relate to the patent of Exhibit No. 3, which is of the date of August 10, 1914, on application; that the ruling should stand as to that.

The MASTER.—Very well; I will let it stand as to that.

Mr. BLAKESLEE.—And as to the other the ruling will be reserved for the present?

The MASTER.—Yes.

[368] Mr. BLAKESLEE.—Before you proceed, I would like to make this suggestion: The machine which is now in evidence as the defendants' 24-P machine I understand was the same machine which the Master inspected with counsel and experts first but that it was reassembled or fixed up to put it in better condition. We hardly think that the test run which was made, or the trials and observations which were made of the plaintiffs' machine on December 22, were entirely fair or comparable with the run made yesterday with the 24-P machine because that was a machine simply quickly selected for the purpose, and we should like to have a further run of a Pacific machine. If the Master wishes that same one to remain in *status quo ante* it can so remain and we will make a run with it

(Testimony of Ray O. Wilson.)

or with another at a cannery or another in our shop; but we should like to have another run at such time as suits the convenience [369] of all concerned.

The MASTER.—I don't think it will be necessary to make that run at the present time. I feel, though, that it would be of advantage to have a run made with some products in. Probably we could have a view of one at a cannery.

TESTIMONY OF RAY O. WILSON, FOR
PLAINTIFFS (RECALLED).

[371] RAY O. WILSON, recalled on behalf of the plaintiffs.

Cross-examination (Resumed).

[375] Q. You referred, Mr. Wilson, to dates at various times when certain things took place, for instance in regard to having made 12 machines, or some such number you thought, some time about 1915. How do you fix that date, and did you refer to any records before you testified or were you just testifying from memory?

A. Yes, sir, from memory.

Q. Whenever those so-called 12 machines were made who made them? What concern made them?

A. I think at that time we called ourselves Sumner & Wilson, or it might have overlapped into the Stetson Machine Company at that time. I am not sure about that.

Q. What was the name? You say the Stetson Company?

(Testimony of Ray O. Wilson.)

A. The Stetson Machine Company was the second name, and Sumner-Wilson Company was the first name we had.

Q. How long did the name of Sumner and Wilson continue before it became Stetson Company?

A. I don't remember.

Q. A short time or a long time?

A. Not very long.

Q. A year, or five years?

A. It wasn't five years; it might have been a year.

[376] Q. Do you remember when the Stetson Machine Company was organized into a copartnership? A. No, I do not.

Q. And you stated you didn't remember whether the articles of incorporation were in writing or not? A. I don't recall that, either.

Q. If I refer you to the records of Los Angeles County to the effect that the Stetson Machine Company was registered in the County Clerk's office on behalf of F. F. Stetson, doing business under the firm name of Stetson Machine Company, filed May 24, 1918, place of business 324 San Fernando Boulevard, Los Angeles, California, would you say that is the concern you refer to? A. Yes.

Q. So then, incidents that you have made mention of in referring to the Stetson Machine Works would be subsequent to that date, wouldn't they?

A. As I have explained a while ago, the Sumner-Wilson Company [377] and the Stetson Machine Company were both copartnerships, and so far as changing the actual condition of things, it did not

(Testimony of Ray O. Wilson.)

change a particle. As far as remembering dates or building so many machines, or the dates of changing the names, I may be away off on it.

Q. The Wilson-Sumner Company, or whatever you call it, merged into the Stetson Machine Company; is that right? A. Yes.

Q. And then the Stetson Machine Company merged into the Pacific Closing Machine Company? A. That is right.

Q. And it appears from the records of this County that articles of incorporation of the Pacific Closing Machine Company were filed with the County Clerk of Los Angeles County on June 9, 1921, the incorporators being specified as the following: Sam B. Irvin, I. B. Stetson, G. L. Chrisope, J. E. McComas, and N. Johnston. Do you recall those names? A. Yes.

Mr. BLAKESLEE.—We object to the question as testimony on the part of counsel. I do not think counsel should state what the records of the county show. If he wishes to prove the dates shown by the records, certified copies can be filed.

Mr. TOWNSEND.—I am testing his recollection.

Mr. BLAKESLEE.—But that is not the way to prove it. We don't know whether the records show that or not, on counsel's statement.

[378] Mr. TOWNSEND.—You have the evidence in your possession to disprove it.

The MASTER.—The evidence will stand, subject to correction. If you can show that Mr. Townsend is in error you will have that opportunity.

(Testimony of Ray O. Wilson.)

Mr. BLAKESLEE.—The witness will bring with him on Wednesday evidence of all these different companies, when they started and ended.

The WITNESS.—I don't know whether we can get it or not.

Mr. BLAKESLEE.—So far as he can.

Q. (By Mr. TOWNSEND.) Who is Mr. Sam B. Irvin?

A. He is Secretary of the Los Angeles Can Company at present.

Q. Is he still living? A. Yes.

Q. And who is I. B. Stetson?

A. Wife of Mr. F. F. Stetson.

Q. Who is J. E. McComas?

A. Attorney in the Loughlin Building.

Q. And who is N. Johnston?

A. That is the stenographer in the Loughlin Building.

Q. Now, when you referred to certain speeds of operation of your Pacific machine in different plants—where you ran 90 in one place and 100 in another, and so forth—when did you make those observations, and particularly when did you make the observation at Hemet?

[379] A. There comes up those dates again. I don't recall all the dates. I have been up there fifty or sixty times probably.

Q. Have you a record with you showing what the run was at the time you say you observed it?

A. No, I have not.

Q. Did you make a written record at the time?

(Testimony of Ray O. Wilson.)

A. No.

Q. You are relying solely on your memory as to what took place in the way of actual runs?

A. Yes. I can prove it, though.

Q. Now would the same answers apply to your observations and testimony regarding the Golden State Cannery wherein you have stated what the run was? A. I think so. Yes.

Q. Well, you are relying on your memory?

A. Altogether.

Q. And you can't tell when you observed those tests? A. Last season at the Golden State.

Q. Where? A. In Ontario.

Q. And did you make any written memoranda?

A. No.

Q. You are relying on your memory?

A. Altogether.

Q. And I suppose you are relying the same way with respect to all the other instances you have referred to? [380] A. Yes.

Q. Now, you said that the Pacific machines were in the Los Angeles Can Company's plant, with two exceptions. A. Yes.

Q. What do you mean by that?

A. They have one 19-P Angelus machine that they use off and on. They were running two body makers at times. When they started up the extra body maker they would hook this other 19-P in the line, off and on. The other one is a 14-P installed in there quite recently to make the tall quart olive cans. Those were the two exceptions.

(Testimony of Ray O. Wilson.)

Q. And you referred to a fish cannery down at Wilmington, where you have had some of your machines, have you? A. Yes.

Q. What is the name of that cannery?

A. The Coast Fishing Company.

Q. Have they any other machines in that plant used for canning fish besides your Pacific machine?

A. Yes, they have the Max Ams, a square machine, and the Angelus 14-P.

Q. How recently did they get some of those Angelus machines, do you know?

A. It must be two or three years, I should say.

Q. When did you put your Pacific machines in there? A. The first of last season.

Q. As a matter of fact, at the time they put your Pacific [381] machine in they put in six or eight Angelus machines at the same time, sold to them by either yourselves or the Los Angeles Can

Q. Am I correct in any part of my question? If Company? A. No.

I have embraced too much in it, put me right.

A. They have the plant completely equipped with Angelus on the round cans.

Q. (By Mr. BLAKESLEE.) What number Angelus?

A. Number 14-P. They installed one of our Pacifics at the beginning of the season, and they made a deal with the Los Angeles Can Company, I understand, where they bought the rest of the Angelus that they had in the plant for \$200 apiece.

Q. That was done quite recently, was it?

(Testimony of Ray O. Wilson.)

A. Quite recently.

Q. And they are using those Angelus 14-P's for canning fish alongside of your Pacific?

A. They use it in the one-pound line, but the half-pound line I understand they use the Pacific altogether.

Q. You referred to a San Diego plant. I want to get the name of that plant.

A. The Lower California Fisheries Company.

Q. What machines have they there?

A. They have the Angelus 14-P and the Pacific.

Q. And they are using both the Angelus and Pacific in [382] their plant?

A. They are using one Angelus and one Pacific, and there is one idle Angelus 14-P. There is the place we replaced.

Q. Who is Mr. Harrington that you referred to as having been the medium of introducing you to Mr. Guenther some years ago?

A. He is the die maker for the Los Angeles Can Company.

Q. Is he in the employ of the Los Angeles Can Company? A. Yes.

Q. Who were you working for when you first met Mr. Guenther?

A. The Smith-Booth-Usher Company.

Q. What is their line of work?

[383] A. Machinery dealers.

Q. Do they manufacture machinery? A. No.

Q. They don't do any manufacturing work at all?

A. Oh, some small stuff, like pulleys.

(Testimony of Ray O. Wilson.)

Q. And repair work possibly? A. Yes, sir.

Q. Do they have a machine-shop? A. Yes.

Q. What was the occasion of your meeting Mr. Guenther at that time?

A. I went out to call on Mr. Harrington. He was an old friend of ours from back in our old home.

Q. And what was Mr. Guenther's work; what was he doing at that time?

A. Just getting ready to build the 14-P.

Q. And where was that?

A. In his shop back of the Los Angeles Can Company.

Q. And you went into his employ? A. Yes.

Q. And he paid for your services? A. Yes.

Q. How long did you continue in his employ?

A. A little under three years, I think.

Q. And when did you say you left?

A. February 10, 1914.

[384] Q. During that time was the Angelus 14-P constructed?

A. Yes, there was several of them.

[385] Q. I suppose by that experience you got to know the 14-P pretty well, did you? A. Yes.

Q. Now, it was during your employment with Mr. Guenther that you got up your so-called can-encircling head, was it not?

Mr. BLAKESLEE.—We object to that, your Honor. The question of the date of invention of any of these matters has not been gone into on direct, and it is proper to reserve it until rebuttal.

We are entitled to know by defendants' proof if they attack our date of invention, and in what manner, and they are not entitled to know in anticipation what our date of invention was so that they can fit their proofs to it. The burden is on the defendant at first to attack the date of our patent application, then in rebuttal we may carry back [386] our date, under the well-established rule of Walker on Patents, Sec. 70, and not until that time are they entitled to a disclosure of our invention. They have not asked it in the interrogatories or by particulars, and are not entitled to know it.

[389] The MASTER.—I think I will rule on it in this way: Until I have further light I will not allow the question. If I can see any materiality in it in the future I may allow it. This is not to be a precedent, I mean. If there is anything to be gained by it I will let in later.

Mr. TOWNSEND.—You mean you will overrule the objection, but will allow the answer to go in?

The MASTER.—No; I sustain the objection.

[395] The MASTER.—Well, I will not allow this question to be answered at this time.

[397] The MASTER.—Well, I will do either one of two things—I will certify the question to the Court or the record will stand as it is.

Mr. TOWNSEND.—I will take an exception and we will have to prove that fact by another witness.

Q. [398] (By Mr. TOWNSEND.) Now, you said in your direct examination that you left the

(Testimony of Ray O. Wilson.)

employ of Mr. Guenther February 10, 1914. Who did you go to work for?

A. I went to work on this new machine.

Q. For whom?

A. Three of us—Mr. Stetson, Mr. Sumner, and myself.

Q. Where did you do that work?

A. At Smith-Booth-Usher's.

Q. Who was working down there on it?

A. Myself.

Q. What was Mr. Sumner's employment during that period and prior thereto?

A. With the Los Angeles Can Company.

Q. During the time you were working for Mr. Guenther was Mr. Sumner, your copatentee, employed by the L. A. Can Company? A. Yes.

Q. In what capacity?

[399] A. In charge of the miscellaneous can department.

Q. Was his location near yours?

A. Yes; next room.

Q. Was he in and out? A. Quite often.

Q. Did he ever observe these 14-P machines?

A. Yes.

Q. Now, after you quit there and went down to Smith-Booth-Usher's place, did Sumner continue on with the Can Company? A. Yes.

Q. In what capacity? A. The same capacity.

Q. (By the MASTER.) Do I understand that Mr. Guenther was an employee of the Los Angeles Can Company?

(Testimony of Ray O. Wilson.)

[400] A. Yes. That is the way I understood it. I am not sure. Up until a month or so before I quit.

Q. I say, there was a machine-shop in the L. A. Can Company in February, 1914, was there not?

A. Yes.

Q. It was equipped suitably for making canning machinery, was it? A. Yes.

Q. And Mr. Guenther was right adjacent there to give you any help or suggestion if you needed it?

A. Yes.

Mr. BLAKESLEE.—I object—

The MASTER.—He has answered.

Mr. BLAKESLEE.—I move to strike it out as immaterial.

The MASTER.—Overruled.

[401] (By Mr. TOWNSEND.) Now can you tell me why, with all the facilities there in the Los Angeles Can Company's shop to do this sort of work, you went off and did this work at Smith-Booth-Usher's?

A. I was not connected with the Los Angeles Can Company, and owing to my friendship made down there during my employment there I went down there, the first natural place I should go.

[402] A. I say, because of my friendship made down at the Smith-Booth-Usher Company when I was employed down there was the main reason I went to their shop.

Q. Now did you have to pay shop rent while you were there? A. Yes, sir.

(Testimony of Ray O. Wilson.)

Q. How long did you work there continuously?

A. Approximately four months.

Q. What was accomplished in those four months?

A. Built the first machine.

Q. In four months, now?

A. Yes. A fast worker.

The MASTER.—Which machine is that—the one in patent Exhibit 3?

The WITNESS.—Yes.

Mr. TOWNSEND.—Well, we are not trying to connect any so-called machine with any patent here. They made *a* machine. They may claim it was built according to that patent, but we don't know that. We haven't the machine here.

Q. Now, who saw that machine while it was undergoing construction at Smith-Booth-Usher's?

A. Any number of people saw it.

Q. Well, just mention some of them.

[403] A. The employees around the Smith-Booth-Usher place.

Q. Give us the names of the individuals besides yourself and Mr. Stetson and Mr. Sumner who saw that machine.

A. Mr. Usher, Mr. Van Wert, and Mr. Cushman—

Q. Did Mr. Guenther see it there?

A. Not to my knowledge.

Q. Did you tell him what you were doing?

A. Yes.

Q. What did you tell him you were doing?

A. I told him that when I quit.

Q. What did you tell him?

(Testimony of Ray O. Wilson.)

A. I told him I was going to build that new machine.

Q. When you say "that new machine," what do you mean? A. The machine we had designed.

[404] A. That is, it was my understanding that the Can Company owned the shop and that Mr. Guenther was in the employ of the Los Angeles Can Company. That was the understanding I had of it at that time.

Q. And do you remember how you were paid? Were you paid by Mr. Guenther or by the Angelus Can Company or by the Los Angeles Can Company?

A. By the Los Angeles Can Company.

Q. You think you were paid by the Los Angeles Can Company? A. Yes.

Q. During all the time you were employed in Mr. Guenther's shop?

A. No; up to a month or so before I quit. I think that is correct, or somewhere near correct.

[406] 514 Post Office Building,
Los Angeles, California, Wednesday, April 4, 1923,
10 A. M.

(Appearances as previously noted.)

The MASTER.—You may proceed in the case of Wilson et al. vs. Angelus Sanitary Can Company et al. At the last hearing we adjourned to January 10, but on that day, due to Mr. Blakeslee's illness, the matter, with the consent of counsel for the defendants, was continued subject to the call of the Master. Various dates were fixed, and for

(Testimony of Ray O. Wilson.)

various reasons continuances were taken, Mr. Townsend also having his turn on the sick list, and with the consent of both counsel the matter is now ready for proceeding this morning. Mr. Wilson was on cross-examination. Do you desire to proceed further with him?

Mr. TOWNSEND.—Yes.

RAY O. WILSON recalled.

Cross-examination (Resumed).

(By Mr. TOWNSEND.)

Q. Mr. Wilson, have you the contract with the L. A. Can Company that has been referred to in the record, and which you and your counsel promised to produce?

A. No, we have no contract. There is no contract so far [407] as I know.

A. We have no contract, and I think we offered the last time to produce some written evidence that there was a contract—that there was an agreement. Now, what form that contract would take I don't know. It would have to be done through Mr. Stetson and the L. A. Can Company. But we have an agreement and we pay the L. A. Can Company royalties and can show a statement to that effect.

Q. You are a party to that contract?

A. The Pacific Closing Machine Company pays the L. A. Can Company a royalty for all machines sold in California.

Q. Are you a party to the agreement, whatever

(Testimony of Ray O. Wilson.)

it is, between yourselves as owners of the patents here in suit and the L. A. Can Company?

A. Yes.

Q. And your signature is to that agreement, is it? A. No.

[409] Q. Well, what did you mean when you and your counsel both stated that the contract was in writing.

A. I thought we had a contract. I thought it was between Mr. Stetson and the Los Angeles Can Company.

Mr. BLAKESLEE.—I don't know as I stated that. I said if there was such a contract we certainly would be willing to produce it. I haven't got it, I will repeat again, and as far as the plaintiffs are concerned the witness is not only advised that he may produce it but the suggestion is made that he produce it if he possibly can, because there is nothing in it to conceal in this matter. I think I have seen a certain paper which Mr. Wilson showed me at the time of the last session that bore on this matter, but I haven't that here. If Mr. Wilson knows where it is, he may state.

The WITNESS.—There was a contract allotting the California rights to Mr. Stetson, and in turn he was to make the arrangements with the Los Angeles Can Company.

Q. (By Mr. TOWNSEND.) Well, I want all papers showing any rights and all the rights of the Los Angeles Can Company in, to, or under these patents. Now is that clear?

(Testimony of Ray O. Wilson.)

A. That is very clear.

[410] Q. Now can you produce those papers?

A. We cannot.

Q. Will you produce it before we adjourn to-day?

A. No. I thought the contract was in writing, and that I would get it if that was the case, but that would have to be done between Mr. Stetson and the L. A. Can Company. I personally have nothing to do with that.

Mr. BLAKESLEE.—I will say that I am not, and I am sure the witness is not, attempting to dodge this issue; that Mr. Wilson, the witness, showed me a certain contract during the last session that bore on this matter, and I think it is the one counsel refers to. I don't know where it is now. If Mr. Wilson does, he may produce it. I haven't it.

The WITNESS.—It is in evidence.

Mr. BLAKESLEE.—I did see that certain contract, and I suppose that is the one you refer to, and I am quite willing to have it produced.

The WITNESS.—That is the contract giving the rights to California to Mr. Stetson.

Q. (By Mr. TOWNSEND.) Well, let us see that contract.

A. It is in evidence, or it was the last day. I haven't it now.

Q. No, it is not in evidence, I think.

A. Well, it was around the table here, I know.

Q. And where is it now? A. I don't know.

[411] Mr. BLAKESLEE.—It was here. I know there was such a contract.

(Testimony of Ray O. Wilson.)

Q. (By Mr. TOWNSEND.) Now, further, on page 373: "Mr. Blakeslee.—We will offer to produce the evidence of the arrangement, and Mr. Wilson has here and will produce the written agreement between the parties that reflects the interest of the L. A. Can Company in the patent which has been withdrawn from suit, and that would be the best evidence, and we are willing to produce it." And again on page 374: Mr. Blakeslee:—we had it here yesterday anticipating you would want it on cross-examination. I saw it, myself." Now, inasmuch as we were not aware of its presence in court, although having asked for it, and it not having been proffered, we did not ask for the possession of it for that reason. Now, your testimony is very much confused here as to the existence of this contract at all and whether it is in writing or not. What is your best answer now as to that matter and in regard to its production in response to my request?

A. I didn't understand the last part of that, about production.

Q. Well, you want your testimony corrected about this agreement to the effect that the L. A. Can Company's agreement is not in writing? It is in writing, is it not?

A. Well, evidently not. Anyway, regardless of that fact they are exercising their rights and we are paying royalties on it.

[412] Q. Well, is all your testimony to be taken

(Testimony of Ray O. Wilson.)

in this loose fashion, that a thing is or is not in existence?

A. When the conditions are loose I guess the testimony will have to be loose. That seems to be it.

Mr. BLAKESLEE.—I have stated, and I state again, that a certain paper was handed to me which bore on the relation of the L. A. Can Company to the patent or patents in suit, and that I scanned it in court here during one of the recent sessions and saw that it contained a patent number agreeing with that of one of the patents in suit. It was here, and it is the agreement to which I referred on the record. That [413] was the last I saw of it. My recollection is that I handed it back to Mr. Wilson, with the understanding that it would be produced at the next ensuing session, which is the present one. I haven't it now and don't know where it is.

Mr. TOWNSEND.—I would like to have had it now to possibly shape my cross-examination on that point.

Q. Now, in regard to the agreement you have with the Pacific Closing Machine Company, to which you have referred, [414] can you produce the writings or papers that embody the understanding between the patentees and the Pacific Closing Machine Company? A. Yes.

Q. Will you do so at two o'clock this afternoon?

A. Yes.

(Testimony of Ray O. Wilson.)

The MASTER.—That will mean your minute-book, will it not?

The WITNESS.—That is all.

Mr. BLAKESLEE.—Make a note, Mr. Wilson, in your book, will you, to look up both of those?

The WITNESS.—Yes.

Q. (By Mr. TOWNSEND.) Just before we closed our last session as appears on page 403 of the record, referring to your relations with Mr. Guenther at the time you were employed by him, you answered: "I told him I was going to build that new machine." What did you tell Mr. Guenther?

A. I think that covers it, that we were going to build the machine. We had designs made. He know of it long before I quit, that we were working on a machine; I am sure of that.

Q. Knew that who was working on the machine?

A. Sumner and myself.

Q. Now just state what you told him.

A. I can't I don't recollect it. But I am sure that I [415] made it clear that that is what I was going to do.

Q. Did you tell him what kind of a machine it was going to be? A. I don't recall.

Q. In your previous answer you indicated that you made it clear to him. Now, what sort of statement did you make to him?

A. I remember the talk on the morning that I told him I was going to quit. We had quite a session, but what we said at that time I don't know.

(Testimony of Ray O. Wilson.)

I don't recall it all. But I know I didn't withhold the fact that—

Q. What did he know about this so-called new machine?

Mr. BLAKESLEE.—We object to that as calling for hearsay, what the other man knew.

Q. (By Mr. TOWNSEND.) You just stated that he knew about it. Now, what did he know about it?

Mr. BLAKESLEE.—The witness is not competent to testify to that.

Q. (By Mr. TOWNSEND.) From what source or by what means had Mr. Guenther any knowledge of your so-called new machine?

A. Why, it was common gossip around the shop that we were working on a new machine.

Q. It was merely common gossip? A. Yes.

Q. You don't know whether Mr. Guenther was a party to that gossip or not, do you?

A. Only I recall the fact that I stated to Mr. Guenther [416] on the day I told him I was quitting that I was going to start on that new machine that I had designed. He knew that.

Q. What do you mean by "designed"? Had you built any part of the machine at that time?

A. No, we just had the drawings completed.

Q. Have you those drawings now?

A. Some of them. The majority of them I guess have been destroyed.

Q. What did those drawings that you had at that time before you left Mr. Guenther show?

(Testimony of Ray O. Wilson.)

A. A complete machine. Practically a complete machine.

Q. Do you mean that you showed those drawings to Mr. Guenther? A. No.

Q. As far as you know, Mr. Guenther never saw them, did he? A. No.

Q. Well, how did he know anything about this so-called new machine that you were going to build?

A. Because I told him, and I knew of several of the boys around the shop that knew about it, so he had ample opportunity of finding it out if I hadn't told him.

Q. What other boys around the shop knew about these drawings that you made at that time?

A. The foreman in charge of the shop.

Q. Who was that? A. Charley Brevear.

[417] Q. The foreman in whose shop?

A. Mr. Guenther's shop.

Q. And who else? A. Mr. Jim Miller.

Q. Who is Jim Miller?

A. He was one of Guenther's mechanics. And Clyde Bell was another mechanic for Mr. Guenther. Those are three that I know of that knew of it.

Q. Had you shown them the complete drawings?

A. No. I had no occasion to.

Q. Now, when you speak of this new machine, as a matter of fact was it not this so-called can-encircling means that you built while you were there with Guenther that you have in mind?

A. No. That was built several months before that. That was built over a year before that.

(Testimony of Ray O. Wilson.)

Q. You think it was built a year before?

A. I am pretty sure.

Q. That is the can-encircling means—you know what I refer to. That is the feed that is shown in your patent that was withdrawn from suit.

A. Yes.

Q. You built that while you were there with Mr. Guenther? A. Yes.

Q. And while you were in his employ?

A. I think I previously stated that I was in the employ [418] of the L. A. Can Company at that time, because I remember I went to Mr. Spencer, the manager of the L. A. Can Company, and asked his permission to use one of the tools in the shop to make the encircling means.

Q. Mr. Guenther was in charge of that shop then, was he? A. Yes.

Q. And you built it on that machine, did you?

A. Yes.

Q. And you built it with the tools and used the material, I suppose, you found there at the shop to build it from? A. Yes.

Q. How long before you left did you build that can-encircling means of this withdrawn patent?

Mr. BLAKESLEE.—Now, we object to that on the same grounds of objection previously urged, that there is no contest here of priority of invention, and that the antecedents of this invention are not properly to be divulged here and are not a matter in issue at all. There is no prior act of

(Testimony of Ray O. Wilson.)

invention set up by the defendants in their pleadings—no contest of priority in this case.

Mr. TOWNSEND.—The witness said about a year. I want to fix it more definitely, and the encircling means is one of the chief elements of—

Mr. BLAKESLEE.—The time when it was built is not material to the issues in this case on the *prima facie* case or on cross-examination of any witness in such case.

[419] Mr. TOWNSEND.—Well, your Honor knows it is. We think that is very material, when a man builds an invention. Not only on the testing of his memory, but on other points. It is a very proper thing to find out the history, when he first disclosed part of it. We want the complete history.

Mr. BLAKESLEE.—Our courts have held that any act pertaining to invention is not material unless there is a controversy as to priority, and that no such date need be produced by a witness in the *prima facie* case, and I think that ruling should be made here, because it is not material to the issue at all. The patent has been offered, and the date of the patent speaks for itself.

The MASTER.—He has already testified on it, and I think it would be proper to fix the date more certainly if he can.

Mr. BLAKESLEE.—I believe we have reserved all exceptions, have we not?

The MASTER.—Yes.

A. My best recollection is that it was on some

(Testimony of Ray O. Wilson.)

holiday in 1912 that I made the ring. Whether it was on Sunday or a holiday I don't recollect. That was in 1912.

Q. (By Mr. TOWNSEND.) Made what ring?

A. The encircling means.

Q. There were several holidays in 1912.

A. That is true. But that is to the best of my recollection. That is as near as I can get to it. It was some holiday or Sunday along in the spring or summer of 1912.

[420] Q. Have you any memorandum or record by which you can fix that date?

A. No, I have not.

Q. How long was that before you left Guenther's employ?

A. A little less than two years, I should say. A year and a half. I left Mr. Guenther on February 10, 1914.

Q. Well, after you built this can-encircling means there, what did you do with it, if anything?

A. I just built one—I built two. The first one was not successful. I had to change the design a little bit on the second one, and then we tried it out for a season's run in the Los Angeles Can Company's plant on one of Mr. Guenther's machines.

Q. On 14-P? A. Yes.

Q. How long after you built the first one did you build the second one?

A. Right away. The first one wouldn't work.

Q. Did you try it out the same season or the next season? A. The same season.

(Testimony of Ray O. Wilson.)

Q. Anyone assist you in building or designing this can-encircling means?

[421] Q. You say you only made two of those while you were there with Mr. Guenther?

A. I think that was all.

Q. How long did the second one continue in use?

A. Something about four million cans, I think, was run on the first successful one that we installed. Four million cans.

Q. What became of it? A. I don't know.

Q. Are you not making a rather wild guess on the success of that second one, about its doing four million cans?

A. That is the figure I have got in my mind, that they made four million cans on it.

Q. And when was that used?

A. I think it was in the 1912 season; or it might have been 1913 that the big run was made on it.

Q. (By the MASTER.) You used it for putting the can bottom on, did you?

[422] A. That is it.

Q. (By Mr. TOWNSEND.) In your opinion the use of that ring was entirely successful?

A. It evidently was. They used it and liked it very much. It was not properly adapted to the machine; that is, that style of machine was not really a right design for that encircling means; it was not strong enough.

Q. Did they take off any other seaming means when they put this on? A. Yes.

Q. What did they take off?

(Testimony of Ray O. Wilson.)

A. We took off the two rollers and levers and balanced the head up and put one lever back on to force the ring over.

Q. What kind of seaming means was on there already, that you took off in order to put yours on?

A. It is the same type that is on the 14-P. Two rollers on each side and a housing.

Q. Similar to this Defendants' Exhibit "P" (showing)?

A. The same as that there, exactly.

Q. Were any other changes necessary in substituting your can-encircling means on that machine in place of the roller seaming means like Exhibit "P"?

A. I think I have stated all the changes necessary.

Q. Well, maybe I didn't quite understand you. Just state them again, if you will.

A. That we took out both levers, balanced the head up, and [423] put another style of lever there to throw the encircling means over.

Q. When you say you took off both levers from the type Exhibit "P," what were those levers?

A. These two here (indicating on Exhibit "P").

Q. Referring to the lever that carries the seaming rollers? A. Yes.

Q. Did you make any other change in the machine in adapting it to the use of your can-encircling means?

A. We had to cut this encircling means we have

(Testimony of Ray O. Wilson.)

got here, I think (Exhibit "P"), to make the die clear so that we could throw it over.

Q. We have referred to the centering cup of Exhibit "P"?

A. Yes. We surely would have to do that, and, as I recall, that is what we did.

Q. Well, do I understand from what you said that you took a can-seaming head here like Exhibit "P" and adapted it, by cutting and replacement, to your style of can-encircling means? A. Yes.

Q. Now, the old seaming roller device that was on there, like Exhibit "P," operated in what manner? Did the can stand still and the seaming rollers like Exhibit "P" revolve, or did the roller stand still and the can revolve?

A. The can stood still.

Q. Now, what happened when you substituted for the original seaming means like Exhibit "P" your can-encircling means? Did [424] the can still stand still? A. Yes.

Q. Then I understand that in the first can-encircling means that you attached to this L. A. Can Company 14-P machine in substitution of the former Guenther seaming head like Exhibit "P," it still held the can stationary and the ring was pressed in against the seam by the roller running around the ring. A. That is it.

Q. And that is the construction shown on this patent to Sumner and Wilson No. 1,124,553, of January 12, 1915 (showing patent)? A. Yes.

(Testimony of Ray O. Wilson.)

Q. And the roller you speak of is shown in dotted lines and marked "10" on Fig. 1 of this patent?

A. That is right.

Q. And the seaming ring, the same figure, is shown in section marked "23"? A. Yes.

Q. That seaming ring 23 is given an eccentric movement [425] with respect to the vertical spindle by means of the circumferentially-traveling roller 10? A. That is right.

Mr. TOWNSEND.—I offer this patent referred to by the witness, No. 1,124,553, dated January 12, 1915, "tool for capping and double-seaming cans," application filed December 19, 1913, in evidence as Defendants' Exhibit "V."

The WITNESS.—I think I made a mistake of a year there. I had no recollection about that time, but the patent shows.

Q. (By Mr. TOWNSEND.) Now, will you explain that statement for the record?

A. Of course there is nothing certain about either one of them, but I would judge from the application, from the date of the application as filed, that it must have been the summer of 1913 when I made the ring.

Q. You want your testimony corrected where you said you thought you put this into use in the summer of 1912? You want that corrected to read the summer of 1913?

A. It must have been; yes.

Q. And, correspondingly, the building of your

(Testimony of Ray O. Wilson.)

first machine was probably on a holiday of 1913 and not a holiday of 1912?

A. The building of the first seaming means would be on a holiday in 1913.

[426] Q. When did you discover that it was preferable or necessary to spin the can to effect the rolling of the seam in the use of your can-encircling means?

A. We never have spun the can at all, but that adapts itself to a better design, is simpler in construction, and higher speed. That is the reason we changed.

Q. And what was that change that you made?

A. Well, I say, by rolling the can around on what we call our first operation turret made a simpler design, and it is not a spinning operation, and does no damage to the can, or spilling the fruit, and it means a simpler design, a sturdier construction, and higher speed I would say.

Q. You object to my use of the word "spinning"?

A. I do.

Q. Because in your mind it meant a relatively greater speed than the turning speed you give it?

A. Yes. It is not a case of spinning.

Q. I was rotating it in the sense of rotating a can, if you would rather have me use that term.

A. Yes, that would be better.

Q. Because for present purposes I had in mind the rotation of the can. So when did you make that change of rotating the can in the operation of turning the seam by means of your can-encircling

(Testimony of Ray O. Wilson.)

means from the method that you have already described [427] and as shown in this Defendants' Exhibit "V"?

A. Well, really, I don't know, Mr. Townsend, when that was; but I can say this, that it was one of the first ideas we had on the machine.

Q. Did you ever make another can-encircling means where the can was stationary?

A. No. Only as applied here. (Exhibit "V.")

Q. You never built a machine according to your invention referred to, complete, in which you used the seaming means such as shown in this patent of yours, Defendants' Exhibit "V," where the can was stationary? A. No.

A. I designed this machine while I was in Mr. Guenther's employ, at home; made all the drawings at home and designed the machine. I spent about six or eight months on that machine at home.

Q. And while you were still in Mr. Guenther's employ? A. Yes.

[429] Q. (By Mr. TOWNSEND.) Did I understand you to say that you made all these drawings yourself? A. Yes.

Q. Now, just explain what drawings those were.

A. A complete—well, it was not exactly a complete—it was more or less of a mixup of drawings, I admit, but I made all of the drawings. They were pen and ink drawings; not very high class drawings, but with a little explanation we could read them. I made those drawings.

Q. A fair exercise of imagination?

(Testimony of Ray O. Wilson.)

A. That is it exactly.

Q. Were they made to scale? A. Yes.

Q. Did you have any particular machine or parts to go by for scaling your drawings? A. No.

Q. Now, going back to this can-encircling means which you designed and built while you were in the employment of Mr. Guenther's company in 1913, as you have testified, can you [430] tell us what suggested that particular form of seaming means?

A. When Mr. Sumner was there he had the idea of a die; see?

Q. Of what?

A. Of this here curling die that we now use.

Q. A curling die?

A. Yes, we call it a curling die. And after two or three days of drawing it out and changing it here and there we finally arrived at the one we put on the 14-P.

Q. Was this curling die suggested in any way by the centering ring of Exhibit "P"—and by Exhibit "P" I mean like the device in use to which you have testified?

A. Well, really I couldn't tell what suggested the idea to Mr. Sumner. In the first place, I don't know where he got it. He came in the shop with it, though, and he had some kind of an idea about a curling die, rolling something around the outside of the can, and we fussed around with it for a couple of days before we were satisfied with it, and then we went ahead on the thing. Where an idea originates is pretty hard to get at.

(Testimony of Ray O. Wilson.)

[431] Q. You are not able to state that the idea of your can-encircling ring or seam-rolling means that you have spoken of was generated from this can-centering means of the defendant? A. No.

Q. You don't think that it had its germination in the defendants' form of structure?

A. I wouldn't say yes or no. I don't know where the idea emanated from.

Q. How long had this structure of Defendants' Exhibit "P," the seaming roller head, been used by Mr. Guenther before you got up this idea of your can-encircling means? How long was it in use, to your knowledge? A. I would say two years.

Q. You are familiar with the Angelus can top curler by [432] which the flange on the can head is curled, exemplified by the can top defendants' Exhibit "R" (showing same)? A. Yes.

Q. How long have you known of that machine?

A. Well, it was made shortly after I went to work for Mr. Guenther.

Q. And that can top curler is illustrated, for example, on page 11 of the Angelus circular for automatic can machinery, general catalog of 1918, which I show you.

A. Yes. Yes, I did some work on that when I was working for him.

Mr. TOWNSEND.—I offer this catalog as Defendants' Exhibit "W."

Mr. BLAKESLEE.—We object to that unless its antiquity is proven. It is not material as a

(Testimony of Ray O. Wilson.)

current publication. It cannot be material in respect to novelty or invention.

Mr. TOWNSEND.—It is illustrative of the witness's testimony, which I am going to follow up.

Mr. BLAKESLEE.—The testimony does not need illustrating, and unless the evidence is material it cannot be proper.

The MASTER.—We will receive it as preliminary.

Q. (By Mr. TOWNSEND.) You do not recall the fact that you got your idea for your can-encircling means shown in your patent, Defendants' Exhibit "V," from this can curler of Angelus which you knew about and worked on at the time you were there in Guenther's employ?

[433] Mr. BLAKESLEE.—We object to that as immaterial and not proper cross-examination, because where an idea originated is not material. Patents are not for ideas; patents, when they are for mechanisms, are for tangible things, and whether or not, remotely, an idea had its genesis in something else is absolutely immaterial. The structures speak for themselves by comparison, and whether or not the inventors of the patent referred to in some way developed their structure from a prior thing which was different is immaterial.

Mr. TOWNSEND.—This is merely a part of the entire examination of this witness. We have touched upon the Exhibit "P" as being contributory to the alleged invention that is here involved.

The MASTER.—You are not suing them for infringement.

Mr. TOWNSEND.—No; but I am showing that the ideas here involved in these patents came from Guenther, and it is not that Guenther's machine came from them.

Mr. BLAKESLEE.—But the patent is not for ideas.

The MASTER.—Now, let me inquire here: This is only part of the structure?

Mr. TOWNSEND.—Yes, surely. I cannot show it all at once.

The MASTER.—You want to show that they got this idea from Mr. Guenther, and then that idea, and then the other, and so forth.

Mr. BLAKESLEE.—Now, if the Master please, so far as counsel can go is to get the witness to admit, if he can, [434] that these things were known to himself and Mr. Sumner prior to the date of application for patent; then counsel can attempt to show an analogy or resemblance between them; but it calls for a conclusion of the witness, further, for him to state that he got an idea as to a thing of his patent from another and dissimilar thing.

The MASTER.—He would know whether he got his own idea from that.

Mr. BLAKESLEE.—Well, counsel cannot make it appear that one of these earlier things is the father of a later and dissimilar thing by questions

(Testimony of Ray O. Wilson.)

calling for nebulous answers as to the similarity of mere abstract ideas.

(Last question read.)

The MASTER.—I think he answered that before.

Mr. BLAKESLEE.—The further objection is made that there is no pleading in this case that any patent in suit was anticipated by these devices referred to, and therefore the examination is absolutely immaterial.

The MASTER.—It goes to the question of invention.

Mr. TOWNSEND.—Of course.

The MASTER.—What do you say, Mr. Wilson?

A. I think I answered that in the prior question when I said that Mr. Sumner had the original idea. Where he got it from, I don't know.

Q. (By Mr. TOWNSEND.) Then that curling die was not your idea at all; is that right?

[435] A. Well, the idea that he had, as shown to me, was unreliable, you see, and the two of us worked it out. That is the reason. He would not come in and take something without giving me something, so he gave me something.

Q. You know this curler is a curling die, as it is called? A. Yes.

Q. Referring now to the cut on page 11 of Exhibit "W." A. Yes.

Q. They refer to that as a curling die, do they not?

A. The inner and outer curling ring. I have heard them use that term. This machine is manu-

(Testimony of Ray O. Wilson.)

factured by three or four different concerns. I remember the first one that came in to the L. A. Can Company, I think it was the McDonald curler, which is the father of this one, I would say. We call them an inner and outer curling ring.

Q. And those were in open and notorious use at the time you were working there when Mr. Guenther was helping you? A. Yes.

Q. By referring to the drawings on your patent here in suit, No. 1,203,295, can-heading machine, and forming part of Plaintiffs' Exhibit 3, can you tell by reference to these drawings, of which there are nine sheets, what portions you personally had laid out in the way of drawings as you have referred to, before you left Mr. Guenther's employ? Just examine those nine sheets carefully and tell me what drawings that you had made up corresponded to those figures, if any. [436] I don't mean in all absolute details, but generally.

A. Well, as I say, I had a complete set of drawings of each and every part of the thing, in a way, you see. You use your imagination to make a complete machine drawing.

Q. (By the MASTER.) Were your drawings anything like the patent drawings?

A. No. There was one assembly drawing similar to this.

Q. (By Mr. BLAKESLEE.) That is, similar to which figure there?

A. Similar to Fig. 2; and I had a layout some-

(Testimony of Ray O. Wilson.)

thing like Fig. 1, I remember that; and then the rest were detail drawings.

Q. Well, what gave you the idea of a machine of that character?

A. That I don't know. I can't recall where that idea originated, of that design. It might have been with Sumner and it might have been with myself. We fussed around on it for quite a while.

Q. Did that idea you had, and which you say was embodied in the drawings, show a two-turret machine or a single-turret [437] machine, or what kind of a machine?

A. It showed the two-turret machine.

Q. Well, don't you know where you got the two turret idea?

A. No, I do not. If you are referring to the Black or the Johnson machine, that machine was almost completed and ready to run before I ever heard there was a Black machine or a Johnson machine.

Q. (By Mr. BLAKESLEE.) By Johnson machine you refer to those patents that we had laid out before you here before, at one of our sessions, some time ago?

A. Yes; Mr. Augensen had them.

Q. (By Mr. TOWNSEND.) Yes. Now, just what was that, again? How far had you progressed before you had heard of the Black machine or the Johnson machine?

A. The machine was almost ready to run, within a week or so. We put the belt on down at the

(Testimony of Ray O. Wilson.)

Smith-Booth-Usher plant before I had ever heard of the Johnson or Black machine. I think that stands true of Mr. Sumner too.

Q. Where and under what circumstances did you first hear of the Black and Johnson double-turret machine?

A. Mr. Spencer spoke of it. He said it was similar to the Black or Johnson machine. I think it was the Johnson machine he referred to. He said it resembled that.

Q. What Spencer was that?

A. T. J. Spencer, manager of the L. A. Can Company.

Q. Is Mr. Spencer living? [438] A. Yes.

Q. Still with the L. A. Can Company?

A. Yes.

Q. (By Mr. TOWNSEND.) Well, what were the features of similarity that Mr. Spencer called attention to between your machine and the Johnson machine?

Mr. BLAKESLEE.—Same objection. It is not material, and it is not the proper method of proof, because those machines are the best evidence as to what they show and not what somebody else said about them,

The MASTER.—I think that is true.

A. Mr. Spencer said nothing to me, but I remember Sumner coming to me and telling me that Spencer had said something about that, and we went down to my attorney and looked it up.

Mr. BLAKESLEE.—Then we move to strike it

(Testimony of Ray O. Wilson.)

all out as certainly [439] hearsay, coming from another person than this witness.

Mr. TOWNSEND.—Well, we will have to get Mr. Sumner. We don't want improper evidence, of course.

The MASTER.—It may remain in. These patents are not pleaded as anticipation, are they—Black and Johnson?

Mr. TOWNSEND.—Yes. They are long anterior to these patents.

Mr. BLAKESLEE.—Well, they speak for themselves. Both counsel and myself will have an opportunity to show them up, and will do so.

Q. (By Mr. TOWNSEND.) Now, most every invention has a beginning: didn't your invention have some beginning, and can't you recall what that beginning was?

A. I thing I have, as near as I possibly can.

Q. What did you do—simply take a drawing board and lay this thing down—

A. That is it exactly, yes.

Q. —without any previous thought or idea about it? A. Yes.

Q. And you put one turret here and you put another turret there?

A. That is it.

Q. How about your can-feeding means that you show in that patent 1,203,295?

A. Well, it was not very good feed.

Q. After you built it it wouldn't function very satisfactorily?

(Testimony of Ray, O. Wilson.)

[440] A. It would in the factory, yes, but not in the cannery. Where the idea originated from I don't know. Whoever originated the idea did us an injury there on that. I don't know where it came from.

[441] Q. (By Mr. TOWNSEND.) Referring more particularly to the can and top feed of this same patent 1,203,295 forming part of Plaintiffs' Exhibit 3, in Fig. 1 and Fig. 20, how did that idea originate?

Mr. BLAKESLEE.—We object to that as calling for a conclusion of the witness. Every invention is presumed to be based upon a conception, and that conception may come very quickly or by a process of development.

The MASTER.—Well, let him tell what he knows about that.

A. I really don't know where the ideas—I couldn't cite a single instance on the machine and how and where the idea originated from, because we would get together nights and Sundays and work on the thing, and it was a long time ago.

Q. How did this can and cap feed in Fig. 20 in the patent [442] work out in practice?

A. Well, we re-designed it and put on our later feed, which is covered by, I think, No. 2 patent we have here.

Mr. BLAKESLEE.—Patent 1,250,406.

The WITNESS.—Yes, I think that is it. This is the only one we ever built like this on the first machine.

(Testimony of Ray O. Wilson.)

The MASTER.—A little louder.

A. I say, this is the only feed just like this. The only one like this was put on the first machine, and after that the other one was installed on each machine.

Q. (By Mr. TOWNSEND.) You mean that the only one you built was like this according to Fig. 20 of your patent 1,203,295?

A. Yes.

Q. And then you re-designed it? A. Yes.

Q. Corresponding to your other patent 1,250,406, dated December 18, 1917, attached to and forming part of plaintiffs' Exhibit 2 (exhibiting same)?

A. Yes, that is it.

[445] The MASTER.—Before we get away from the revolving encircling means, let me see if I have it correctly. In the plaintiffs' machine they have an encircling means which operates on the can top by means of a cam during the first operation while the can itself is revolving about one and a quarter times. In the second operation they have rollers to roll the same down. And in the defendants' device they use Exhibit "P" in both operations.

Mr. TOWNSEND.—No, they use a little different form of roller in the second operation to roll down the seam. The can revolves in the second operation, but is stationary in the first operation.

The MASTER.—You have a different form of roller in the second operation, then?

(Testimony of Ray O. Wilson.)

Mr. TOWNSEND.—I think that shows in some of our blue-prints on file.

[446] The MASTER.—Your photographs show the same thing, apparently.

[447] AFTERNOON SESSION—2 o'clock.

RAY O. WILSON recalled.

Cross-examination (Resumed).

(By Mr. TOWNSEND.)

Q. Have you the papers we asked for, Mr. Wilson? A. Mr. Blakeslee has them.

[449] (The document last above referred to is in the words and figures following, to wit:)

“EXCLUSIVE TERRITORIAL GRANT BY OWNERS.

WHEREAS, Arthur D. Sumner and Ray O. Wilson, of Los Angeles, California, did, on August 10th, 1914, file an application in the United States Patent Office for Letters Patent on ‘CAN HEADING MACHINE,’ the Serial Number of which is 856117, and

WHEREAS, the said Arthur D. Sumner and Ray O. Wilson did, on this day, December 21st, 1914, make an Assignment in writing to F. F. Stetson, of Los Angeles, California, of an undivided forty per cent of said application, invention and Letters Patent to be issued on the same, and

WHEREAS, Arthur D. Sumner, Ray O. Wilson and F. F. Stetson are the owners of said above-named application and invention, and

WHEREAS, the said F. F. Stetson is desirous of acquiring the exclusive right, title and interest in and to said application, invention and Letters Patent to be issued on the same for, to and in the State of California,

NOW, THEREFORE, the said Arthur D. Sumner, Ray O. Wilson and F. F. Stetson, for and in consideration of Ten Dollars (\$10.00) Gold Coin of the United States, together with other good and valuable considerations, in hand paid to them by the said F. F. Stetson, the receipt of which is hereby acknowledged, do hereby grant, sell, convey, assign, transfer and set over to the said F. F. Stetson, of Los Angeles, California, his legal representatives and assigns, for the term for which said respective Letters Patent have been granted and issued or may be granted, issued, or extended, the sole and exclusive liberty, right and privilege of practicing the said invention and manufacturing, using and selling to others to be used, devices and machines embodying the said invention or licensing others to practice the said invention and to manufacture, sell or use devices and machines embodying the same for, to and in the State of California and for, to and in no other place or places whatsoever, in the same force and effect as the said Arthur D. Sumner, Ray O. Wilson and F. F. Stetson, themselves, could so practice the said invention and manufacture, use, or sell to others to be used, devices and machines embodying the said invention or license others to practice the said invention, or manufacture, sell or use devices and machines embodying the same for,

to and in the said state aforesaid had this license not been granted.

IN WITNESS WHEREOF, the said Arthur D. Sumner, Ray O. Wilson and F. F. Stetson have hereunto set their hands and seals on this the 21st day of December, A. D. 1914.

[450] ARTHUR D. SUMNER. (Seal)
RAY O. WILSON. (Seal)
F. F. STETSON. (Seal)

In presence of:

E. A. MILLER,
J. E. HAYES.

State of California,
County of Los Angeles,—ss.

On this 21st day of December, 1914, before me, E. A. Miller, a Notary Public in and for said County of Los Angeles, State of California, personally appeared Arthur D. Sumner, Ray O. Wilson and F. F. Stetson, known to me to be the persons who executed the within instrument and acknowledged to me that they executed the same.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Seal] E. A. MILLER,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires March 20th, 1918.

Recorded Jan. 12, 1915. U. S. Patent Office.

DEPARTMENT OF THE INTERIOR,
United States Patent Office.

Received and Recorded on the 12th day of Janu-

(Testimony of Ray, O. Wilson.)

ary, 1915, in Liber T, 96, page 338 of Transfers of Patents.

In Testimony Whereof, I have caused the seal of the Patent Office to be hereunto affixed.

THOMAS EWING,
Commissioner of Patents.

Excl.

H.S.W.”

Q. (By Mr. TOWNSEND.) Now, that does not seem to reach the point we were on this morning and to which the testimony I quoted from as given by you at different sessions related, concerning the exclusive rights of the L. A. Can Company in these patents. Have you that paper?

A. Evidently not; no.

Q. Well, do you have it personally?

A. No.

Q. Who would have that?

[451] A. Mr. Stetson, if there is one in existence.

Mr. TOWNSEND.—That is the paper or one of the papers that were expressly asked for this morning, the paper showing the vested interests, whatever they may be, of the L. A. Can Company in these patents in suit. I do not see any way but to issue a *subpoena duces tecum* to get them if we cannot get them here by their voluntary production.

The MASTER.—Isn't Mr. Stetson here?

Mr. TOWNSEND.—Yes, he is here.

Mr. BLAKESLEE.—I don't know of any such

(Testimony of Ray, O. Wilson.)

paper. That is the paper I saw the other day, I am very sure.

The MASTER.—Well, ask Mr. Stetson if there is such a paper.

Mr. TOWNSEND.—Well, he is not on the stand now. Of course we cannot charge counsel for the production of these papers. He ought to prevail upon his client to assist us here rather than compel us to resort to process to bring in these papers that they state are in existence.

Mr. BLAKESLEE.—That is what we are doing. We brought this paper that you asked for. Another paper has been submitted to me which bears upon an entirely different device not involved in this suit at all. That is the only one we can find which meets the trend of your questions.

Mr. TOWNSEND.—This paper only refers to a then pending application, serial No. 856117.

Mr. BLAKESLEE.—Which is the serial number of patent Exhibit No. 3 in this case.

[452] Q. (By Mr. TOWNSEND.) Now, was there any other paper of a like nature that you and your co-owners made to Mr. Stetson or the L. A. Can Company affecting the other two patents in suit? A. Not that I know of.

Mr. TOWNSEND.—Mr. Blakeslee, can you give any light on that? You can consult Mr. Stetson who is here in the courtroom.

Mr. BLAKESLEE.—I have consulted Mr. Stetson and he has brought me every paper he could find which he thought bore on it, two in number,

and one is the paper which has been here spread on the record, and the other is a paper which you are at liberty to see if you wish, and which pertains to an application serial number not involved in this suit at all.

Mr. TOWNSEND.—Does it involve any one of the four patents concerned in this suit?

Mr. BLAKESLEE.—Not at all. This has been recorded (producing second document), so it is a matter of public record. “Tool for Capping and Double-Seaming Cans,” serial No. 808925, which is not the serial number of any one of these patents, and it is obviously immaterial here.

The MASTER.—Is it your understanding, Mr. Blakeslee, that the agreement between Mr. Stetson and the L. A. Can Company is oral?

Mr. BLAKESLEE.—So far as I know. I have seen no paper that shows it.

[453] Mr. TOWNSEND.—This exclusive territorial grant you have just handed me, Serial No. 808925, seems to correspond with the serial number of Sumner and Wilson patent 1,124,553, “Tool for Capping and Double Seaming Cans,” originally sued upon and withdrawn.

Mr. BLAKESLEE. — (Examining document) Yes, you are correct. I didn't check it with that patent that had been withdrawn. If you want that put in it may go in, of course.

Mr. TOWNSEND.—I think it had better go in and then it may be returned to you. This paper is entitled: “Exclusive Territorial Grant by Owners,”

purporting to be dated December 21, 1914, "recorded in the U. S. Patent Office January 12, 1915, in Liber G, 96, page 319 of Transfers of Patents."

Mr. BLAKESLEE.—We have no objection to its being copied into the record, other than that it is immaterial inasmuch as that patent has been withdrawn. Subject to that objection, we consent to its being copied into the record.

The MASTER.—It will be received subject to that objection.

(The document last above mentioned is in words and figures following, to wit:)

“EXCLUSIVE TERRITORIAL GRANT BY OWNERS.

WHEREAS, Arthur D. Sumner and Ray O Wilson, of Los Angeles, California, did, on December 19th, 1913, file an application in the United States Patent Office for Letters Patent on 'TOOL FOR DOUBLE SEAMING CANS,' the Serial Number of which is 808925, and

WHEREAS, said Application for Letters Patent was allowed August 20th, 1914, and

WHEREAS, the said Arthur D. Sumner and Ray O. Wilson and [454] F. F. Stetson, of Los Angeles, California, are now the owners of said above-mentioned application, invention and Letters Patent to be issued on the same, in the following proportions, viz.: Arthur D. Sumner Thirty per cent. (30%), Ray O. Wilson thirty per cent. (30%) and F. F. Stetson forty per cent (40%) thereof, and

WHEREAS, the Los Angeles Can Company, a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business at Los Angeles, California, is desirous of acquiring the exclusive right, title and interest in and to said application, invention and Letters Patent to be issued on the same for, to and in the State of California,

NOW THEREFORE, the said Arthur D. Sumner, Ray O. Wilson and F. F. Stetson, for and in consideration of Ten Dollars (\$10.00), Gold Coin of the United States, together with other good and valuable considerations, in hand paid to them by the said Los Angeles Can Company, a corporation, the receipt of which is hereby acknowledged, do hereby grant, sell, convey, assign, transfer and set over to the said Los Angeles Can Company, a corporation, of Los Angeles, California, its legal representatives and assigns, for the term for which said respective Letters Patent have been granted and issued, or may be granted, issued or extended, the sole and exclusive liberty, right and privilege of practicing the said invention and manufacturing, using and selling to others to be used, devices and machines embodying the said invention or licensing others to practice the said invention and to manufacture, sell or use devices and machines embodying the same for, to and in the State of California and for, to and in no other place or places whatsoever, in the same force and effect as the said Arthur D. Sumner, Ray O. Wilson and F. F. Stetson, themselves, could so practice the said inven-

tion and manufacture, use, or sell to others to be used, devices and machines embodying the said invention or license others to practice the said invention, or manufacture, sell or use devices and machines embodying the same for, to and in the said state aforesaid had this license not been granted.

IN WITNESS WHEREOF, the said Arthur D. Sumner, Ray O. Wilson and F. F. Stetson have hereunto set their hands and seals on this the 21st day of December A. D. 1914.

ARTHUR D. SUMNER. (Seal)

RAY O. WILSON. (Seal)

F. F. STETSON. (Seal)

In the presence of:

E. A. MILLER.

J. E. HAYES.”

State of California,

County of Los Angeles,—ss.

On this 21st day of December, 1914, before me, E. A. Miller, a Notary Public in and for said County of Los Angeles, [455] State of California, personally appeared Arthur D. Sumner, Ray O. Wilson and F. F. Stetson, known to me to be the persons who executed the within instrument and acknowledged to me that they executed the same.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Notarial Seal] E. A. MILLER,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires March 20th, 1918.

(Testimony of Ray O. Wilson.)

DEPARTMENT OF THE INTERIOR,

United States Patent Office.

Received and Recorded on the 12th day of January, 1915, in Liber G, 96, page 319 of Transfers of Patents.

In Testimony Whereof, I have caused the seal of the Patent Office to be hereunto affixed.

THOMAS EWING,
Commissioner of Patents.

Excl.

H.N.L.

Q. (By Mr. TOWNSEND.) Now, in regard to the other two patents in suit, corresponding to Plaintiffs' Exhibits 1 and 2, have the L. A. Can Company any rights under those patents?

A. We have always worked to that end and considered it that way. They have rights to the machine and practically all new developments that come up.

Q. Are those rights identical with the rights conveyed by these two instruments we have just copied into the record?

Mr. BLAKESLEE.—That calls for a conclusion of the witness.

The MASTER.—Yes.

Mr. TOWNSEND.—We don't seem to have any other way of establishing it.

A. Personally I have always considered that they did have [456] those rights in the machine and every improvement we put on it.

(Testimony of Ray, O. Wilson.)

Q. (By Mr. BLAKESLEE.) In other words, a license for the State of California; is that your understanding? A. Yes.

Mr. TOWNSEND.—Now, pardon me. These two conveyances here are not licenses, they are exclusive grants.

Mr. BLAKESLEE.—That is a question. It is not drawn by a patent lawyer, and whether it is a grant or license is something that at this time cannot be passed upon.

Mr. TOWNSEND.—We will have to pass up the inquiry until we have some officer of the L. A. Can Company to testify on the subject.

Q. Now, what have you to say as to the interest of the Pacific Closing Machine Company under these patents or any of them?

A. I brought the minute-book up there, which I think will clear that side of it up. Mr. Blakeslee has that.

Mr. BLAKESLEE.—The minute-book I do not think we will want to submit. I will state that I have examined it and it recites nothing as to any transfer. It does make recitals as to certain payments to be made to the L. A. Can Company, but it does not recite any transfer in any respect, and I don't think, for that reason, that the minute-book should be introduced here.

[457] The MASTER.—Mr. Townsend, did you ask Mr. Wilson if the Pacific Closing Machine Company had any interest in the patent?

(Testimony of Ray O. Wilson.)

Mr. TOWNSEND.—Yes, in four places in the record. For instance, on page 203 (reading). Now, presumably they have [458] granted the same kind of rights to the Pacific Company, made the same sort of a grant; for the Pacific Coast outside of California, that they granted to Mr. Stetson here in these two documents we have just had produced.

The MASTER.—Why not ask him what they did grant?

Mr. TOWNSEND.—I have tried to find out.

Q. Will you answer the question as suggested by the Master? What did you grant to the Pacific Company?

A. It is pretty hard for me to answer that question, because, really, I don't know anything I could say that would help you out at all, because we just naturally drifted into it the same as with the L. A. Can Company. There is no document between the two, only what is on the minute-book there.

Q. (By the MASTER.) Did you give them any right to license anybody else? A. No.

Q. (By Mr. TOWNSEND.) Now, what did you grant, you and the others having the right to these patents, to the Pacific Closing Company?

A. I should think there was no grant made. In other words, the three of us are the main stockholders in the Pacific Closing Machine Company, and that is just the instrument for building machines

Q. Are you three the only stockholders of the Pacific Closing Company? A. No.

[459] Q. You have other stockholders?

(Testimony of Ray O. Wilson.)

A. Yes.

Q. And you have issued stock under the authority of the Corporation Commissioner of the State of California in the Pacific Closing Machine Company?

A. Yes.

Q. And I presume the Pacific Closing Machine Company attributes some value to whatever those rights may be to manufacture under those patents, does it not?

A. I should think it naturally would.

Q. Now, do you want the Court to believe that the Pacific Closing Machine Company was organized to build these machines and to have gone on and built them, and that you have got [460] other stockholders in here and you haven't anything but a hazy, feathery sort of right under those patents?

Mr. BLAKESLEE.—I think that question is a little far-fetched. Things that are hazy and feathery are not on paper; they may be on birds in the sky.

The MASTER.—Tell what their rights are there; that is the quickest way to get at it.

A. I should think it would come under the same category as the rights to the L. A. Can Company. They have the exclusive right to California, we will say, and we have always understood it that way. The same thing applies to the Pacific Closing Company. I don't think I can make it any clearer than that.

Q. (By Mr. TOWNSEND.) Now, how many States are included in this grant to the Pacific

(Testimony of Ray O. Wilson.)

Closing Company, say on the Pacific Coast, excluding California?

A. All those west of the Rocky Mountains.

Q. Will you name them?

A. Well, they would be Washington, Idaho, Oregon, Utah, New Mexico, the Hawaiian Islands, and Alaska, and Nevada. That would probably cover them.

Q. Now, the grant to the Pacific Closing Company in those States, according to your understanding, is the same in form and substance as that shown in those two papers—concerning those two previously mentioned papers that have been copied into the record by stipulation a few minutes ago?

[461] Mr. BLAKESLEE.—We object to the question as calling for a legal conclusion on the part of the witness. That may be very important, because the word “grant” is used, which has a significance to lawyers which it may not have to laymen, and I do not think by using technical terms on cross-examination anything can be gained here.

Q. (By Mr. TOWNSEND.) I don't care whether you call it a grant or a license or an assignment or anything else, I want to know whether that is your understanding of the rights to be conveyed, to be substantially identical with the form shown in these two papers which have been copied into the record since our meeting this afternoon.

Mr. BLAKESLEE.—We object on the ground the question calls for a legal conclusion, and I do not think you can get at it in any such way.

(Testimony of Ray O. Wilson.)

The MASTER.—It could not be the same form, because he says it was oral.

Q. (By Mr. TOWNSEND.) Well, I am not trying to split hairs on the thing, but whether the rights granted are the same kind of rights and to the same extent. Is that clear?

Mr. BLAKESLEE.—I don't think the witness is qualified, and I think it calls for a conclusion of the witness.

The MASTER.—That is a conclusion. You might ask him what rights they have, and to specify them, the particular ones you want to know about.

Mr. BLAKESLEE.—Now, the trouble with that, your Honor, is [462] this, that this testimony cannot help them at all, because if it is a grant, there being three types of transfer of rights—one by grant, one by license, and one by assignment—if it is a grant it must be in writing; if it is an assignment it must be in writing; if it is a mere license, however, it might be parol; but if it is a mere license the question is immaterial because the licensee is not a necessary party; so I don't see where the question can get us.

Mr. TOWNSEND.—I don't see why they want to keep this thing under cover and not let us have the whole title.

Mr. BLAKESLEE.—We don't. We produced everything we could find.

Q. (By Mr. TOWNSEND.) Now I have read the conveyance in this paper which has been copied into the record of "Exclusive Territorial Grant by

(Testimony of Ray O. Wilson.)

Owners” of application serial No. 856117, “Can Heading Machine,” which application corresponds to the patent of Plaintiffs’ Exhibit 3, and the grant reads as follows: “Now, Therefore, the said Arthur D. Sumner, Ray O. Wilson and F. F. Stetson, for and in consideration of Ten Dollars (\$10.00), Gold Coin of the United States, together with other good and valuable considerations, in hand paid to them by the said F. F. Stetson, the receipt of which is hereby acknowledged, do hereby grant, sell, convey, assign, transfer and set over to the said F. F. Stetson, of Los Angeles, California, his legal representatives and assigns, for the term for which said respective letters patent have been granted and issued, [463] or may be granted, issued, or extended, the sole and exclusive liberty, right and privilege of practicing the said invention and manufacturing, using and selling to others to be used, devices and machines embodying the said invention or licensing others to practice the said invention and to manufacture, sell or use devices and machines embodying the same for, to and in the State of California and for, to and in no other place or places whatsoever.” Now, is that the kind of conveyance or right that the Pacific Closing Company has?

Mr. BLAKESLEE.—We object to that on the same grounds. Furthermore, it is impossible of answer. Where an arrangement is merely verbal, as is the case here, if there is an arrangement, it would be impossible for a layman at least to have a defi-

(Testimony of Ray O. Wilson.)

nite mental concept of such agreement as would coincide with such formal language. It calls absolutely for a conclusion of the witness.

The MASTER.—I think you will shorten the matter by letting him answer.

A. No.

Q. (By Mr. TOWNSEND.) Well, what has it got?

A. Well, I should think this would explain it. The Pacific Closing Company was organized by the three patentees—

Q. (By Mr. BLAKESLEE.) Sumner, Stetson and Wilson?

A. Sumner, Stetson, and Wilson; and it was organized for building this machine. Naturally, the rights would go to it. The first was the Sumner-Wilson company, then the Stetson [464] Machine Company, and then they incorporated into the Pacific Closing Machine Company, and, naturally, the rights went right along with it. If the patentees would withdraw, particularly one, Mr. Stetson, there would be very little of the Pacific Closing Machine Company left; so in other words, I think it would be a licensee, the same as we contract our work out some place else to be built.

Q. (By Mr. TOWNSEND.) Do you want us to understand or believe that there is not a scratch of a pen between you three gentlemen and the Pacific Closing Machine Company?

Q. (By the MASTER.) Is there anything else you can tell us about this thing, Mr. Wilson?

(Testimony of Ray O. Wilson.)

A. No.

Q. (By Mr. TOWNSEND.) Now, isn't there a scratch of the pen [465] showing the arrangement, whatever it is, between you gentlemen and the Pacific Closing Machine Company?

The MASTER.—That is a proper question. It is another way of asking him whether it is in writing.

Mr. BLAKESLEE.—He has already answered it.

Q. (By the MASTER!) Is there any writing at all?

A. Nothing that bears on a license or a grant, that I know of.

Q. (By Mr. TOWNSEND.) Is there anything else that bears on the subject at all?

A. Not that I know of.

Q. Well, you would have been a signatory to that, would you not? A. I would.

Q. And you would know if there was such a paper?

A. It is possible that I could forget it if there had been, but I say there is none that I know of.

[467] The MASTER.—I don't see but what Mr. Wilson has testified as frankly as he can remember here. The transaction looks all right to me. Now you may be able to produce some other evidence here later.

Mr. TOWNSEND.—I think we should be permitted to see the minutes affecting this thing in the points where Mr. Wilson thinks it has bearing.

(Testimony of Ray O. Wilson.)

The MASTER.—Not without further foundation.

Q. (By Mr. TOWNSEND.) Did you ever talk with the Board of Directors in a meeting duly assembled as to what their rights should be?

A. I know we have talked that there should be an agreement between the patentees and the Pacific Closing Machine [468] Company.

Q. With whom did you do that talking?

A. In the directors—at the meeting of the Board of Directors.

Q. Was there any record made of that talk?

A. Now, whether we went into the minutes or not I don't know. I know they were all present. It might have been just an informal meeting and not recorded. But I remember of a conversation along that line, that there should be some agreement, and that was not much over six or seven months ago.

Q. What directors were present at that time?

A. The full quota.

Q. And who were those directors? Name them.

A. Mr. Sumner, Mr. Stetson, Mr. Irvin, Mr. Murray, and myself, and the secretary.

Q. (By the MASTER.) Have you directors talked between yourselves as to what your rights were—or what the corporation's rights were?

A. No. But to straighten out that tangle that evidently Mr. Townsend is trying to get the straight of now, we talked over that agreement between the patentees and the Pacific Closing Machine Company, to clear that up, you see.

(Testimony of Ray O. Wilson.)

[469] Q. (By Mr. TOWNSEND.) Now getting back to the drawings that you stated you had made of the completed machine—that is, drawings representing the entire machine, while you were still in Mr. Guenther's employ, and which drawings you stated showed a two-turret carriage, can you give us any more information as to what those drawings showed and what the different views were?

Mr. BLAKESLEE.—Our objection still runs to this whole examination as immaterial; that the patent speaks for itself, and the development of the patent is immaterial under the issues in this case. There is no attack upon it to prove prior invention by anyone else, and no race of diligence or priority of invention here.

[470] Mr. TOWNSEND.—I want to know what was done up to the time that he left Mr. Guenther's employ, and then I will follow on in the matter of—

The MASTER.—Do you desire to show that it belongs to Mr. Guenther because he did it before he left his employ?

Mr. TOWNSEND.—Well, what the legal consequence of it is I am not prepared to state at this time.

Mr. BLAKESLEE.—There is no such issue in the pleadings.

The MASTER.—The question of who is the inventor is not material, is it?

[471] The MASTER.—My recollection is that this morning I said I would let you ask him about certain dates he had already testified to, but I did

(Testimony of Ray O. Wilson.)

not intend to make any ruling as to the other point, because I didn't know what the law was.

Mr. TOWNSEND.—Suppose I re-frame the question.

The MASTER.—All right.

Q. (By Mr. TOWNSEND.) Did those drawings that you had prior to your leaving Guenther illustrate a plan view similar to Fig. 1 of this patent 1,203,295 contained in Plaintiffs' Exhibit 3?

Mr. BLAKESLEE.—We object to that as entirely immaterial, because there is no issue in this case that involves it.

The MASTER.—I will let him answer that because he has already answered it.

A. Well, it was not as fine as to detail, but it had the general outline of that kind of a drawing.

Q. (By Mr. TOWNSEND.) Who made that drawing? A. That I don't know.

Mr. BLAKESLEE.—You mean the drawing of the patent?

Mr. TOWNSEND.—No, the drawing of the—

A. Oh, I made that drawing myself.

Q. How big a drawing was it?

[472] A. I think it was half scale.

Q. What do you mean by "half scale?"

A. Half the size of the machine.

Q. And how big would that sheet be?

A. Approximately 24 by 36.

Q. Did you have any assistance in making it?

A. No assistance as far as making the drawings, no.

(Testimony of Ray O. Wilson.)

Q. Did you have any assistance in the composition of it? A. Yes.

Q. By whom? A. Mr. Sumner.

Q. What are Mr. Sumner's initials?

A. A. D.

Q. Did you have any assistance from anybody else? A. Not that I know of.

Q. Did anybody else make any suggestions about that drawing or any of the drawings? A. No.

Q. Now, in regard to the drawings, at that time did you have any that would correspond to sheet 2 of this patent 1,203,295?

A. Yes, I had one similar to that.

Q. Did that drawing show a bell crank for the second operation seaming roller, which bell crank is marked "127" on this Figure?

Mr. BLAKESLEE.—We object to that specific question. It has been answered before, and it is immaterial.

[473] The MASTER.—It seems to be immaterial; but I will let him answer.

A. I don't remember.

Q. (By Mr. TOWNSEND.) Did the drawings you had show a second seaming operation?

A. I had some drawings showing that. Naturally it would have to.

Q. What form of second seaming operation did you intend using?

A. Approximately the same as shown in this cut.

Q. Patent 1,203,295?

(Testimony of Ray O. Wilson.)

A. Closer to scale, though, than these; but something like that; a roller, cam, a seaming roller, and adjustment.

Q. Would you have bell cranks like "142" and "125" on Fig. 8 of this patent?

A. The equivalent of that, yes. You must remember that is a patent drawing and not a scale. Mine was a scale, and patterns were made from them.

Q. Now that bell crank second seaming operation that you use there, wasn't that similar to the one they had on the 14-P?

Mr. BLAKESLEE.—May it be shown that the same objection of immateriality stands to this whole line of examination?

The MASTER.—If it is agreeable to Mr. Townsend.

Mr. TOWNSEND.—I think counsel had better make his objections as he goes along. The ruling may stand, of course.

The MASTER.—Well, we might just say "Same objection" and [474] "Same ruling."

(Last question read.)

Mr. BLAKESLEE.—Same objection.

The MASTER.—Same ruling.

A. I don't think there is any similarity about them.

Q. (By Mr. TOWNSEND.) How are they different?

Mr. BLAKESLEE.—Same objection.

(Testimony of Ray O. Wilson.)

A. Well, that is an adjustable bell crank; the one on the 14-P is not. That is operated directly from the cam, and the one on the 14-P is not.

Q. (By Mr. TOWNSEND.) You were familiar at that time, of course, with the second seaming operation of the 14-P? A. Yes.

Q. Did that operation of the 14-P at that time, that second seaming operation, compare favorably with this showing on Defendants' Exhibit "A" at the top of same, marked "Second Operation Seaming Station" (showing)?

A. You mean does this bell crank compare with the one I saw on the 14-P at the time I was working for Mr. Guenther?

Q. Well, generally, yes. A. Yes.

Q. (By the MASTER.) That is, does this drawing show the operation you were familiar with at that time? A. On the 14-P?

Q. Yes. A. Yes.

[475] Q. (By Mr. TOWNSEND.) You have already testified, Mr. Wilson, as I recall, that you built but one of these cap feeds such as shown in Fig. 20 of patent 1,203,295, Plaintiffs' Exhibit 3, and that then you changed to the form of your other patent, 1,250,406, Plaintiffs' Exhibit 2. Is that correct?

A. That is correct as far as I can recall now. I am sure we only built one of these—patent 1,203,295.

Q. Are you building the form shown in 1,250,406 now? A. In some cases, for repairs, yes.

(Testimony of Ray O. Wilson.)

Q. That is, just for repairs, where they are already out? A. Yes.

Q. This form 1,250,406, is it not the form that we observed on the plaintiffs' machine at the time of the inspection? A. No.

Q. When did you change over from 1,250,406 to the present form?

A. It has been about four years ago.

Q. And in all practically new machines you have you use the present form practically exclusively?

A. Yes.

Q. And the present form is the one we saw the other day where you kicked the cap in, as it were?

A. Yes.

Q. Do you recall how many of these devices, of patent 1,250,406, you built? Or take it the other way: for how long [476] you used it before you changed four years ago to the present form?

A. I should say we used this about three years; that is, patent No. 1,250,406, dated December 18, 1917, application filed January 14, 1916.

Q. You think you used that about three years?

A. I think so.

Q. And since then you have used this kicker arrangement? A. Yes.

See



